3016

No. 387 & 406.

Brf. of Atty. for Appellee.

Filed Dec. 10, 1900.

Office Supreme Court U.S.
FILED
DEC 10 1900

In the Supreme Court of the United States.

October Term, 1900.

CHARLES F. W. [illegible], Appellant,

vs.

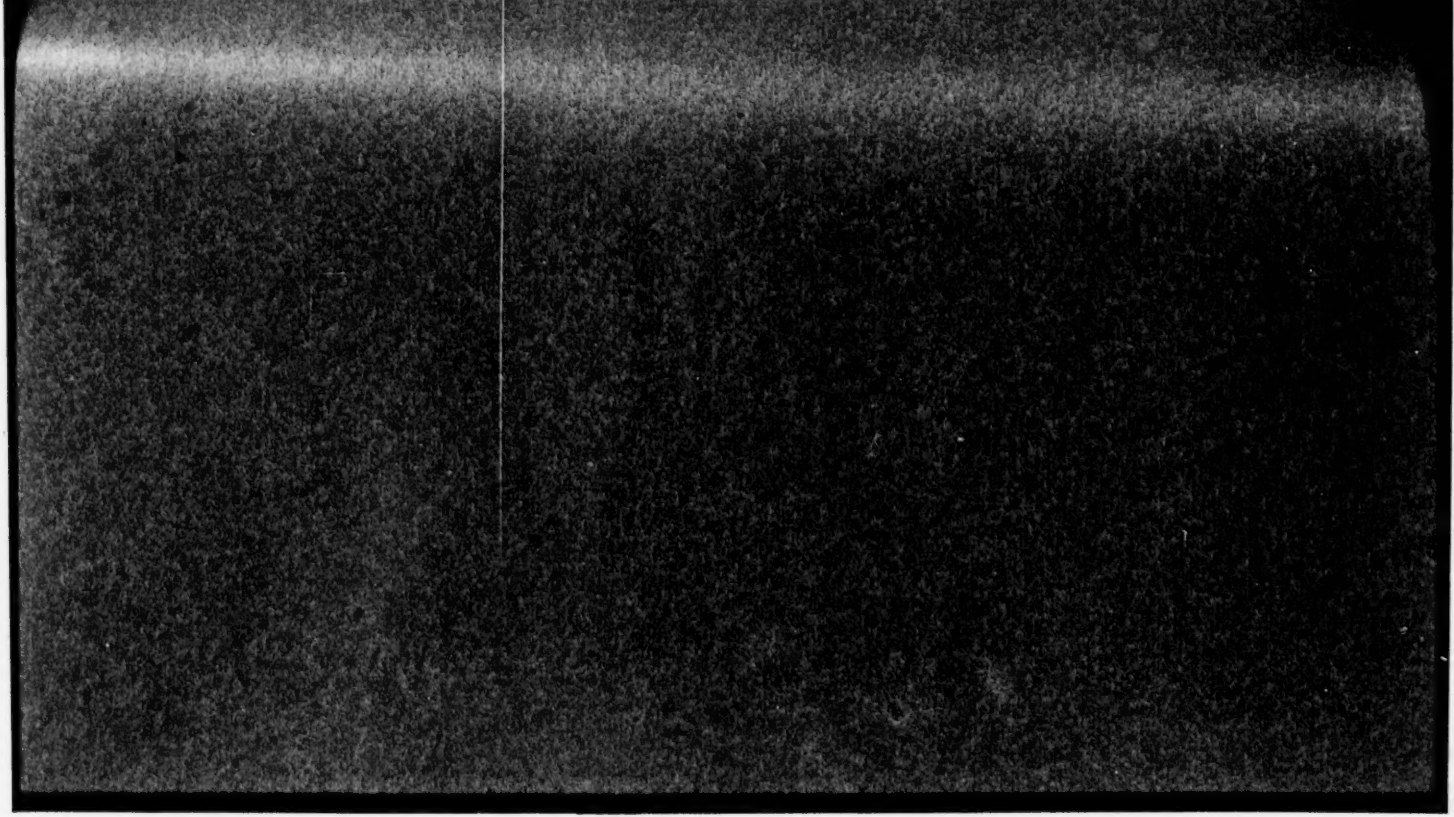
WILLIAM HENKEL, United States marshal for the southern district of New York.

Nos. 387 and 406.

APPEAL FROM THE [illegible] OF THE UNITED STATES FOR THE [illegible] OF NEW YORK.

BRIEF FOR THE APPELLEE ON THE FACTS.

[illegible]
Attorney for Appellee.



30168

CONTENTS.

	Page.
Statement of the case	1
Argument	5
The question at issue	8
Outline of argument	13
The right to extradite	18
The custom of nations as to extradition	20
Duty to extradite as stated by commentators	23
United States Government's exercise of right to extradite	27
Decisions of Supreme Court as to extradition	37
Policy of extradition a political, not a judicial, question	43
Chief fallacy of appellant's argument	44
The right of the United States to govern Cuba	46
The United States the present sovereign power in Cuba	47
Characteristics of a sovereign state	48
The Cuban revolution and the question of sovereignty	51
Cuba territory *pro tempore* of the United States	67
Necessity of further occupation a political, not a judicial question	68
Power of Congress to legislate in aid of President	69
Application to Cuba of constitutional guaranties as to jury trial	80
Case of *ex parte* Milligan	86
Conclusion of argument	94
Appendix:	
Judge Lacombe's opinion	97
Opinion of Judge Duggan, of Louisiana	104
The Arguelles case	112
The Cuban criminal code	115
The President's message of December 3, 1900	122

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES F. W. NEELY, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES marshal for the southern district of New York.

Nos. 387 and 406.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The appellant, Charles F. W. Neely, is admittedly in the custody of the United States marshal for the southern district of New York. He was first arrested on May 5, 1900, on a criminal proceeding, and was, on May 7, 1900, released on bail. The second warrant issued on May 22, 1900, and he was committed under this warrant to the custody of the United States marshal in default of bail.

Subsequently, to wit, on June 27, 1900, application was made to the said circuit court by Ernest W. Baldwin, assistant United States attorney for the southern district of New York, for a warrant to arrest Neely pending extradition proceedings. It charged the said Neely with being a public employee, to wit, the finance agent of the department of posts in the city of Habana, island of Cuba, and with having embezzled, on the 6th day of May, 1900, the public funds of the said island of Cuba to the amount of $10,000 or more, in violation of chapter 10, article 401, of the Penal Code of the said island of Cuba.

It further averred that the said Neely was a fugitive from justice and within the territory of the United States, to wit, in the city of New York, and that Neely had been regularly indicted by the judge of the court of the first instance and instruction of the cathedral district of the said city of Habana for embezzlement of the public funds, and that the judge of said court had ordered his arrest and requested his extradition. The application further set forth that the military governor of Cuba, then the chief executive officer of said island, being Leonard Wood, major-general, United States Volunteers, had, on the 13th day of June, 1900, issued his requisition for Neely's extradition to the President of the United States.

On the same day a similar application was made by the said assistant United States attorney, which only differed from the first application in averring the embezzlement of postage stamps, moneys, funds, and other property belonging to the department of posts in Cuba to the amount of $57,000 in gold, in violation of sections 37 and 55 of the postal code of the said island of

Cuba. Two warrants of arrest were issued in pursuance of these applications, each dated June 27, 1900, and both issued by E. Henry Lacombe, circuit judge of the circuit court for the southern district of New York. The application for the habeas corpus, in section 3, avers that the said Neely "was arrested and taken into custody and brought before the said circuit judge, at the United States courts and post-office building, in said borough, by the said United States marshal under color and by pretense of the authority of the said warrants." These warrants bear the judicial indorsement "Remanded till decision."

The applications for extradition were originally heard on June 29, 1900, before Circuit Judge Lacombe, and at that hearing counsel for Neely moved for a dismissal of the said applications on the ground that the act of Congress of June 6, 1900, was unconstitutional. This motion was denied by Circuit Judge Lacombe on July 18, 1900, in an opinion which affirmed the constitutionality of the act of June 6, 1900, and which, as it has not been printed with the record in the case, is printed as an appendix to this argument, in order that the views of the lower court as to the constitutionality of the law may be known to this court. No final decision was then rendered, but the court, while overruling the objections to the legality of the proceeding, fixed July 23 for the presentation of proofs as to whether there was probable cause for believing that the said Neely had violated the laws of Cuba in the manner set forth in the applications for the extradition.

On July 23, 1900, and July 24, 1900, proofs were offered in support of the allegations of the petition, and under the penal code of the State of New York, which prevailed as a rule of procedure, the opportunity was afforded Neely to offer any evidence in disproof of such allegations. No decision was rendered at that time, but Judge Lacombe indorsed both warrants as follows: "Remanded till decision, July 24, 1900." After a full presentation of the testimony and argument, the circuit court, in an opinion by Judge Lacombe, on August 8, 1900, expressed an opinion upon the facts of the case. He found that "the Government has abundantly shown that there is probable cause to believe that Neely is guilty of the offense of 'embezzlement or criminal malversation of the public funds,' he being at that time a 'public officer' or 'employee' or 'depositary.' Such an offense is obnoxious to the penal code in force in Cuba, article 401 of which provides that 'the public employee who, by reason of his office, has in his charge public funds or property and who should take (or consent that others should take) any part therefrom, shall be punished, etc.'"

The learned judge further found that "The evidence shows probable cause to believe that the prisoner is guilty of an offense defined in the act of June 6, 1900, and which is also a violation of the criminal laws in force in Cuba, and upon such evidence he will be held for extradition." Thereupon these applications were made by Neely for a writ of habeas corpus and upon the denial of the writ, these appeals were taken by the petitioner.

ARGUMENT.

I.

Without regard to possible technical objections of which the Government might avail itself, the Government earnestly desires that this court may consider and authoritatively decide the questions involved in these proceedings upon their merits.

While the Government might with reason ask that the two appeals in this case be dismissed for technical reasons, yet there is no disposition on its part to determine a question which affects the liberty of the subject upon narrow or technical grounds.

If there be such technical objections to the relief prayed for, the Government waives them. It takes this course for two reasons. In the first place, the liberty of an American citizen is at stake. If he be unjustly detained by reason of a warrant issued in pursuance of an act of Congress which is a violation of the Constitution, he should be discharged on the merits of his application, and not further vexed with an unlawful imprisonment. Not only is he concerned in this, but the people of the United States are equally interested and concerned that in this or in any matter there shall be no violation of the Constitution of our country, and no nice or technical question should stand in the way of an authoritative decision by this tribunal as to whether the act of Congress already quoted is, as contended by the Government, a just exercise of legislative authority under the Constitution, or, as contended by Neely, a violation of that instrument and a usurpation of a right of legislation which does not exist.

There is another public reason which calls for a final and authoritative decision of this question. The United States made war against the Kingdom of Spain in the discharge of a duty which it conceived it owed to humanity. It expressly disclaimed any selfish purpose in so doing. It took possession of Cuba in the course of the war and, finally, in negotiating a treaty of peace with Spain, it accepted the possession and control of Cuba for the purpose of pacifying it and erecting, in place of the Kingdom of Spain, a stable and responsible government of the Cuban people.

It has been said to be in this matter a trustee, not only for the Cuban people, for whose benefit it at present governs the island until the Cuban people can construct their own government, but Article I of the treaty of Paris provides that "the United States will, so long as the occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property." Our country is therefore a trustee, not only for the Cuban people, but for civilization. Upon it are both the duty and responsibility of providing a just and honest government for the Cuban people, and its position therefore is one peculiarly of trust and honor.

The testimony in this case, as disclosed to the satisfaction of the learned judge who under the act of Congress heard it, shows that Neely, a citizen of our country, and in our employ in Cuba in the department of posts, has violated his trust and embezzled the funds committed to his charge. It is a matter of common knowledge that his alleged defalcation became a scandal which

attracted the attention of the civilized world and gravely compromised the honor and good name of this Government. The public interests, as well as the fair fame of the Republic, imperatively require that the said Neely shall be extradited to Cuba with the least possible delay, in order that he may be tried for the offenses of which he stands indicted. Undue delay in bringing him to justice would further compromise this Government and injure it in the estimation of the Cuban people and of the world at large.

If, therefore, the Government could, upon technical grounds, ask the court to dismiss these appeals, yet such course would only mean prolonged delay and further appeals to this court. A new application signed and sworn to by Neely could readily be made, and if and when the United States attorney discontinues the prior proceedings above referred to, under which Neely was first taken into custody, and the said Neely thus becomes a prisoner of the marshal solely by virtue of the two warrants issued in the extradition proceedings, a new application for a habeas corpus could be made if this court should decline at this time to hear the whole case upon its merits.

It is as much to the prejudice of the Government as to that of Neely that there should be any further delay in this matter. The constitutionality of his extradition must be determined at some time, and the public interests require that it be determined now. It is due to Neely on the one hand, if he can not be extradited, that he be at once relieved from what, in that event, would be an unlawful detention under these extradition warrants. On

the other hand, if he can not be extradited, it is of equal importance to the Government that it proceed forthwith to try him on the criminal charge now pending in the court of New York.

In this connection it may be stated that the Government, in accordance with the elementary principles of constitutional law which have prevailed in our country by virtue of express constitutional provision, and in England for a thousand years as a part of the unwritten constitutional principles of the Anglo-Saxon race, prefers that Neely should be tried at the place where his alleged crime was committed. To try him in New York for acts which were in fact committed in the distant city of Habana would not be in accordance with the great constitutional principles of government which control the administration of justice in both England and America. If, on the other hand, Neely has been arrested under valid warrants, the public interests and the public honor alike imperatively require that he be extradited to the country, where it is charged by indictment duly found in a court of competent jurisdiction that he abused its hospitality, violated its laws, and embezzled its funds.

II.

THE QUESTION AT ISSUE.

The question at issue is the right of the United States as a sovereign nation to extradite or remove one of its citizens to a country which the United States is occupying and controlling, both by virtue of its power to make

30173

war and its power to make and execute treaties, in order that the said citizen may there be tried in the local courts of that country for a crime of which he stands charged and of which there is probable cause for believing he is guilty.

It is not a question as to the right of any one department of the Government to order such extradition, for in the case at bar the three great departments of the Government have concurred and cooperated in the act of extradition which is now under review.

The United States, acting through its legislative body, the Congress of the United States, has provided that "Whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein * * * and who shall depart or flee, or who has departed or fled, from justice therein to the United States, * * * shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed." Such is, therefore, the will of this nation, expressed through the one department of the Government vested with the power to make laws, and there is no contention that the case at bar is not within the meaning of this act of Congress. On the contrary, the learned counsel for the appellant concedes that the act was passed

for the express and immediate purpose of extraditing his client.

The Executive Department has likewise concurred in this extradition, for the requisition therefor is made by the military governor and civil magistrate of the island of Cuba, who in that capacity represents the President of the United States, both as the Commander in Chief of its armies and Chief Magistrate; and while it is possible that, if an order for extradition were made, the President might ultimately refuse it, yet, so far as the record shows, the Executive Department of the Government has joined in the application for extradition.

The judicial branch of the Government has likewise concurred in the propriety of the extradition and has actively cooperated to effect it. Under the express language of the act, the circuit court of the district in which Neely was found has judicially determined, after a full hearing of the testimony, that the arrest of Neely is not without probable cause, but that the evidence has established that there is probable cause for believing that he has violated the laws in force in Cuba and has fled from justice therein.

The question then arises whether the Supreme Court on a writ of habeas corpus will determine that such arrest and detention are void for want of legal power to make them. To reach this conclusion this court must hold that Congress is without authority to make the law, that the Executive was without authority, in the discharge of international obligations, to ask or demand such surrender, and that the judicial department of the Government was without authority to hear or determine

the case. This court will not do this unless it is clear beyond a reasonable doubt that all three departments of the Government have exceeded their powers. (*Nicol* v. *Ames*, 173 U. S., 509.)

The contention of the appellant in its nakedness, therefore, amounts to this: That if the United States, in bringing a war to a successful conclusion, or in discharging the solemn obligations of a treaty, shall temporarily occupy another country, and if in such country the gravest crimes shall be committed by anyone not in the military service, and such criminal shall flee to this country, it is an inviolable asylum to protect him and his kind, and this notwithstanding the fact that this country in the discharge of its international obligations and express treaty stipulations is under an express obligation to protect life and property in Cuba by the adequate punishment of crimes against either.

The appellant logically contends that if an American citizen should apply the torch of the incendiary to the homes of the Cuban people from one end of the island to the other, and should assassinate Cubans, Americans, and foreigners in said island, and should then flee to the United States, this country, although solemnly pledged to protect life and property in Cuba during the period of its occupation, is such a cripple among nations that it is powerless to deliver such criminal to the local authorities of Cuba to be tried for their offenses against life and property.

The Government contends, on the other hand, that if independent nations, either by virtue of treaty obligations or voluntarily, and in the spirit of comity between friendly States, have surrendered criminals who sought

an asylum within their territory, such right is equally inherent in our nation as a sovereign power. It would not necessarily follow that this right could be exercised by the Executive alone, and it may require the concurrence of the law-making power, which in the first instance determines the will of the nation. But where such law-making power has authorized any act which other sovereign nations, in their friendly intercourse with nations, may of right do, and especially where our solemn treaty stipulations with another power require that we should do that act as a necessary means to protect life and property in another land, the nation acting through its Congress and Executive has, in the language of the great Declaration, "full power" to do an act "which independent States may of right do."

In this connection it should be observed that the plaintiff in error does not question the applicability of the act of June 6, 1900, to the present case, but broadly denies the power of Congress to pass such a law. Upon well-considered principles the judicial department of the Government will never declare an act of Congress invalid unless it clearly and undeniably contradicts some constitutional restriction upon such legislation, or is shown with equal clearness to be beyond the power of Congress to pass. When such want of power is alleged, the judicial department of the Government will be especially averse and reluctant to restrain or impair the powers of the Government, and for these reasons this act of Congress will not be declared invalid, unless it is clear beyond reasonable doubt that Congress was without power to pass it. (*Nicol* v. *Ames*, 173 U. S., 509.)

30175

III.

OUTLINE OF ARGUMENT.

It may be suggested *in limine* that the authority of the act of June 6, 1900, and of these proceedings thereunder may be justified in two aspects.

It may be regarded as an act of extradition by reason of the inherent right of the United States as a sovereign nation to extradite a fugitive criminal to a foreign country over which we have no jurisdiction, in accordance with the usages of nations.

Or it may be justified as a removal of the appellant from one part of the United States to a territory which is subject to our jurisdiction, and over which we are for the time being exercising full sovereignty.

In the one case, the proceeding is extradition, which implies the surrender by one nation of a fugitive criminal to another country.

In the second aspect of the case the surrender of Neely to the civil courts in Habana is not an act of extradition, but a removal, in analogy to the removal from one judicial district to another, for which Revised Statutes, section 1014, makes provision. While Revised Statutes, section 1014, may not be broad enough to authorize the removal of Neely to Cuba, yet the act of June 6, 1900, specifically extends the right of removal from one part of the United States to any territory, when such territory is "occupied by or under the control of the United States."

The question, therefore, whether this proceeding should be treated as an extradition or a removal necessarily depends upon the political status of Cuba and the relation

which it at present bears to the United States. If, on the one hand, it is a foreign country and we have no power to legislate for its internal affairs, notwithstanding its present occupation by the Army of the United States, then the law of extradition governs the case. But if, on the other hand, Cuba, while not included within the political boundaries of the United States, is yet subject to our jurisdiction, and at present under our control, either under the war-making or treaty-making power, then the act of June 6, 1900, must be regarded as simply an extension to our existing code of criminal procedure, and provides a means whereby a criminal who has fled from the territory of Cuba to the United States may be removed to stand trial at the place where his offense was committed. In this aspect of the case, if Cuba is at present subject to our dominion, and within our jurisdiction, the power to punish by legislation crimes against our laws, and the incidental power to provide the means and procedure for such punishment, including process for the detention and removal of men charged with crimes, would seem too clear for argument. As will be argued hereafter, lands and people may be subject to the jurisdiction of the United States without being a recognized part of the United States. This fact, while seemingly paradoxical, is illustrated in every war, when, at least temporarily, lands captured by our conquering armies, with their inhabitants, become subject to our jurisdiction and dominion. Thus, for example, the city of Santiago, after its surrender to our victorious army, became subject to our jurisdiction and belonged to, although it was not a part of, the United States,

30176

and over it we exercised, according to the law of nations, and under the power to make war, every essential right of sovereignty. Internationally it was a part of the United States; constitutionally it was not. "This was some time a paradox, but now the time gives it proof." In other words, conquered territory does not become a recognized and permanent part of the United States until the political branch of the Government accepts it as such. Our territorial boundaries do not advance with our successful armies, nor retire before an invading foe. (*Fleming* v. *Page*, 9 How., 603.)

While, therefore, Cuba is not a foreign *state*—for there is no such state recognized by our or any other Government—yet it is "foreign" to us to the extent and in the sense that the island has not been incorporated either by the treaty of Paris or by the legislation of Congress into the Union, either as a State or Territory. But it by no means follows that because it is foreign it is not "land appertaining to the United States" by reason of conquest and treaty stipulation, and subject to our jurisdiction and dominion *pro tempore*.

That land may be subject to the jurisdiction of the United States, and yet not a part of the United States, is shown by the Constitution itself, for the thirteenth amendment provides that "Neither slavery nor involuntary servitude * * * shall exist within the United States *or any place subject to their jurisdiction*." Our jurisdiction on the high seas, in barbarous countries, in consular courts, that exercised upon the decks of our vessels, and in grounds occupied by our legations, are

all familiar instances of extraterritorial jurisdiction, and such jurisdiction has been sustained by this court in the case of *In re Ross* (140 U. S., 453), where this court sustained a sentence of death imposed by an American consular tribunal in Japan. This court affirmed the constitutionality of the acts of Congress (R. S. 4083–4096) providing for extraterritorial rights in Japan, China, and other countries, and the punishment of crimes by American citizens therein, and the trial for such offenses by our consular officers, and it may be observed that the right to establish these consular courts, as our present right to govern Cuba, was attributed by this court to the law of nations and treaty stipulations.

The contention of the appellant, therefore, that the United States cannot govern an island which we occupy under the provisions of a treaty, and for whose government we are responsible, is absolutely without warrant, either in principle or authority, and its adoption by this court would seriously cripple the United States and deprive it of an essential attribute of sovereignty.

It is not important or necessary to decide this nice question as to the political status of Cuba, for Neely's extradition is justified whether Cuba be foreign or domestic territory. We have only sought to suggest to the court that his surrender to the judicial authorities of Cuba can be justified either as an act of extradition under the law of nations or as a removal to a territory subject to our jurisdiction, in which and as to which we have direct and plenary powers of government. The argument, therefore, will naturally divide itself into two propositions:

1. The United States as a sovereign nation has the

30177

right, acting through its legislative, executive, and judicial departments, to extradite a fugitive criminal, even though he be an American citizen.

2. The United States, having acquired for the time being all rights of sovereignty in Cuba, has the right to proivde for the punishment of crime therein, and the procedure and process therefor, including the right of removal of a person charged with crime to the place where his offense was committed.

PART I.

THE RIGHT TO EXTRADITE.

IV.

(1) The United States as a sovereign nation has the right, acting through its legislative, executive, and judicial departments, to extradite a fugitive criminal, even though he be an American citizen.

In his opinion, Judge Lacombe has placed the contention of the Government upon its best and surest foundation, namely, that it is an inherent attribute of a sovereign nation to deny an asylum to a criminal fleeing from the outraged laws of a friendly nation. Such right is indispensable in the intercourse of friendly powers and is imperatively required by the comity of nations, and the necessity of its exercise will grow greater as civilization advances and the ultimate goal of humanity, namely, "the parliament of man and the federation of the world," comes nearer.

The great unifiers of the human race, steam and electricity, are increasingly binding nations together in a closer unity of interests and contact by bonds of steel and lightning, and while this duty to humanity of assisting in the prevention of wrong and the punishment of crime has always existed and been recognized, yet, in this evening of the nineteenth century, when the inventive genius of

man has put a Puck-girdle around the globe, the right of extradition has become indispensable to the well being of a sovereign State.

The United States lacks no essential attribute of a sovereign power. While, therefore, it has at times been said that the right of extradition is an incident to the treaty-making power, and, while, unquestionably it can be legitimately deduced from such power, yet the right to extradite, as has been well pointed out by Judge Lacombe in his opinion, does not depend exclusively upon the exercise of the treaty-making power, but is also an incident to the right of the Federal Government to conduct all intercourse with foreign nations. (See *United States* v. *Rauscher*, 119 U. S., 414.) The power to make treaties, to appoint ambassadors and consuls, to make war and conclude peace, all indicate that, in the words of the great Declaration, the Federal Government has power "to levy War, conclude Peace, and to do all other Acts and Things which Independent States may of right do."

In support of this contention, counsel for the Government submits three propositions for the consideration of the court:

(*a*) That, under the law of nations, it has been customary and usual from time immemorial for independent nations, either with or without treaty, to surrender fugitive criminals to the country whose laws have been violated.

(*b*) That the political department of the Federal Government, while generally disinclined, *as a matter of public policy*, to surrender a fugitive criminal, especially if he be a citizen, in the absence of a treaty provision, has

exercised this right of surrender in the absence of treaty provisions, and this right has been affirmed and never denied by the courts, where an act of Congress authorizes its exercise.

(*c*) That the question as to whether a fugitive criminal should be surrendered as a matter of public policy is not a judicial question, but is solely and exclusively for the political department of the Government.

V.

THE CUSTOM OF NATIONS.

(*a*) *That, under the law of nations, it has been customary and usual from time immemorial for independent nations, either with or without treaty, to surrender fugitive criminals to the country whose laws have been violated.*

The right and practice of extradition goes back to the remotest ages. The rule of nations before the dawn of the Christian era clearly was that any nation had a right to surrender a fugitive criminal. The earliest extradition treaty on record was concluded by Rameses II, the Pharaoh who "knew not Joseph," and Khitasar, King of the Khita over thirteen centuries before the Christian era. It provided for a strict return of fugitives from both countries. (Burgsch, "Egypt and the Pyramids," II, 71–76.) It is true that under the Jewish law cities of refuge were made as sanctuaries of crime, but their very existence implied that in all other places criminals were denied the right of asylum. Similarly in the times

of the Roman Republic certain allied cities were specified as inviolable places of refuge for fleeing criminals, especially those who had gone into voluntary exile for political reasons. But the very existence of these places carried with it a corresponding exclusion of all other places as an asylum for crime. When these cities were merged into the Roman Empire, they lost their character as a refuge for fleeing criminals.

History has preserved some instances of extradition from oblivion. Thus, at the end of the war with Antiochus, King of Syria, the Romans stipulated by treaty for the surrender of Hannibal, who, however, escaped. He was afterwards demanded of the King of Bithynia and the demand conceded. The Roman law expressly provided for the surrender to a foreign nation of any Roman citizen who offered violence to foreign ambassadors on Roman territory, and instances of an exercise of this right are recorded in Rein. Criminalrecht der Roemer. Prior to the modern era there was comparatively little occasion for extradition, for without the locomotive or the steamship and in days when all transportation was attended with difficulty criminals had few means of escape. The necessity, however, for extradition was early recognized by the leading states of the world.

Thus, by a treaty concluded as early as 1174 between Henry II of England and William of Scotland, it was agreed that if any persons guilty of felony in England should fly into Scotland they should be immediately seized and either tried in the courts of the King of Scotland or delivered up to the Justices of England, and vice

versa. (Ward's History of the Law of Nations, vol. 2, 319.) England and France concluded a treaty as early as 1303 by which a similar agreement to refuse protection to the enemies of either was given. In 1378 the Duke of Savoy and Charles V of France agreed by treaty that all malefactors who had fled from Savoy to Dauphiny or from Dauphiny to Savoy should be delivered up, even if they were subjects of the State surrendering them. (Isanbert, Collection des Lois, vol. 5, p. 479.)

The *Intercursus Magnus* concluded between Henry VII and the Flemings in 1497 provided, as stated by Lord Bacon in his "History of Henry VII," an express article against the reception of the rebels of either prince by other. On February 23, 1661, England concluded a treaty with Denmark by which the latter agreed to deliver up on requisition the regicides who had been concerned in the murder of Charles I. The States-General of Holland surrendered some of the regicides without any treaty, and in 1662 executed a general treaty of extradition for stipulated offenses with England. There are also repeated instances of surrender of fugitive criminals in the absence of treaty stipulation—the delivery up of Count de St. Pol to Louis XI, the surrender of the Earl of Suffolk by the King of Spain to Henry VII, and the promise of Elizabeth to deliver Bothwell to the Scots; while, on the other hand, there are instances where such demands of surrender have been refused, as, for example, the refusal of France to deliver up Cardinal Pole to Henry VIII.

VI.

THE LAW AS STATED BY RECOGNIZED AUTHORITIES.

More light is thrown upon the question as to the status of extradition in international law by reference to the great authorities upon that branch of the law, for, as was well said by Mr. Justice Gray in the case of *The Paquete Habana*, 175 U. S., 677, resort must be had "to the customs and usages of civilized nations; and as evidence of this, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

Commencing with the great fountain head of knowledge on this subject, Grotius, we find the following statement:

> This right [to punish criminals] is not to be impeded by the State in which the offender lives, or its rulers. But as States are not accustomed to permit another State to enter their territory armed for the sake of executing punishment, nor is that expedient, it follows that the city where he abides who is found to have committed the offense ought to do one of two things—either itself, being called upon, it should punish the guilty man, or it should leave him to be dealt with by the party which makes the demand; for this is what is meant by giving up, so often spoken of in history. * * * All which passages, however, are to be understood, that the people or king are not strictly bound to give up the

> person, but, as we have said, to punish him. * * * It is a disjunctive obligation. (Book 2, chap. 21, secs. 3 and 4.)

Vattel affirms the same obligation either to punish or surrender in the following words:

> This is pretty generally observed with respect to great crimes, which are equally contrary to the laws and safety of all nations. Assassins, incendiaries, and robbers are seized everywhere, at the desire of the sovereign in whose territories the crime was committed, and are delivered up to his justice. The matter is carried still further in States that are more closely connected by friendship and good neighborhood. Even in cases of ordinary transgressions, which are only subjects of civil prosecution, either with a view to the recovery of damages, or the infliction of a slight civil punishment, the subjects of two neighboring States are reciprocally obliged to appear before the magistrate of the place where they are accused of having failed in their duty. Upon a requisition of that magistrate, called "letters rogatory," they are summoned in due form by their own magistrates, and obliged to appear. An admirable institution, by means of which many neighboring States live together in peace, and seem to form only one republic. (Book II, sec. 76.)

Puffendorf has been cited by Story in his Conflict of Laws, page 879, as disaffirming this obligation to surrender, but, as has been pointed out by Clark in his admirable Treatise on the Law of Extradition, page 4, this is an error. He regarded as an open question whether the refusal to surrender was a just cause for war, but this is very different from denying the obligation to surrender. He, however, says, in one of his least-known works,

"That a sovereign State is presumed to have power over its subjects, and that knowingly suffering them to commit crimes it shares their guilt." He adds "that the liability to war which a State incurs when it receives and protects fugitive criminals arises rather from special compact than from any general obligation." (Lib. 2, chap. 16.) This, however, does not deny the duty of surrender as an obligation, but simply affirms that failure to discharge the duty does not rise to the dignity of a *casus belli* in the absence of a treaty stipulation.

Burlamaqui in his Principes du Droit de la Nature et des Gens calls the right of surrender "une obligation commune et indispensable."

The two great jurists of America have this to say on this subject:

Story, in his work on the Constitution, section 1803, says:

> However the point may be as to foreign nations, it can not be questioned that it is of vital importance to the public administration of criminal justice, and the security of the respective States, that criminals who have committed crimes therein should not find an asylum in other States, but should be surrendered up for trial and punishment. It is a power most salutary in its general operation, by discouraging crime, and cutting off the chances of escape from punishment. It will promote harmony and good feelings among the States, and it will increase the general sense of the blessings of the National Government. It will, moreover, give strength to the great moral duty which neighboring States especially owe to each other, by elevating the policy of the mutual suppression of crime into a

legal obligation. Hitherto it has proved as useful in practice as it is unexceptionable in its character.

Kent, in his Commentaries, page 40, says as follows:

> The language of these authorities is clear and explicit, and the law and usage of nations as declared by them rests upon the plainest principles of justice. It is the duty of the Government to surrender up fugitives upon demand, after the civil magistrate shall have ascertained the existence of reasonable ground for the charge, and sufficient to put the accused upon his trial. The guilty party can not be tried and punished by any other jurisdiction than the one whose laws have been violated, and therefore the duty of surrendering him applies as well to the case of the subject of the State surrendering as to the case of a subject of the power demanding the fugitives.

And it will be seen hereafter that Kent, as a judge, adhered to the position which he had taken as a commentator.

It is true that to enforce this general and, as some writers have called it, this "imperfect" obligation, treaties are often made, and it has been claimed that the making of a treaty excludes the theory of any obligation independent of the treaty. Mr. Clark, in the treatise already referred to, page 11, disposes of this argument effectively in the following sentence:

> This clearly is a *non sequitur;* a treaty may often be necessary to regulate and limit the performance of a duty of undisputed obligation; and that the granting of extradition is, if not scientifically speaking a matter of perfect obligation, at least a duty of public morality, has not been denied by any writer worth notice.

It is not necessary, however, to enter upon the nice distinctions as to whether the obligation is perfect or imperfect. While this subject has been the fruitful cause of controversy, yet there has been no real dispute as to the moral or ethical obligation of a State to surrender a fugitive criminal, unless such surrender in some way conflicts with its policy or sense of justice; and it is equally clear that, acting upon this discretion, sovereign nations from time immemorial have, for reasons which commended themselves, surrendered or refused to surrender fugitive criminals. Independent of treaty stipulation, the matter is purely one of comity, but this does not make the right to surrender from considerations of comity less important to the well-being of a State.

VII.

GOVERNMENT'S EXERCISE OF RIGHT.

(*b*) *That the political department of the Federal Government, while generally disinclined, as a matter of public policy, to surrender a fugitive criminal, especially if he be a citizen, in the absence of a treaty provision, has exercised this right of surrender in the absence of treaty provisions, and this right has been affirmed and never denied by the courts, where an act of Congress authorized its exercise.*

The question of extradition is not a new one in this country. On the contrary, by reason of our peculiar institutions, no country has had greater experience with reference to it. This has given to our judges and statesmen exceptional opportunities for placing the true

grounds for the exercise of the right on a broad and just basis. To quote the very graceful compliment of Mr. Edward Clark, of the English bar, in the work referred to, "The American judicial bench has been adorned by men who added the lawyer's knowledge to the statesman's thought, and who, bringing both to bear on the questions of public law, have left us works of enduring value."

Prior to the Revolution, when the colonies occupied, as against each other, the relation of foreign States, a criminal who committed a crime in one of these colonies and fled to another was arrested wherever found and sent for trial to the place where the offense was committed. (See *Case of Short*, 10 Serg. and Rawl., 129.) The Constitution, while leaving the whole matter of international extradition to the discretion of the Federal Government, provided that, as between the States, "a person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime."

While this constitutional provision has no application to international extradition, it yet shows the spirit of our law, which is to punish rather than to shield the criminal. Time was when, because of the rigor of the law, the function of government seemed to be to protect the guilty and innocent alike, but this time is happily past.

After the revolution, the first case in which the question of extradition arose was that of Chevalier de Longchamps, in 1784. The chevalier had been indicted before the court of oyer and terminer at Philadelphia for

threatening bodily harm to the consul-general of France, and also for assault. He appeared to be an officer of the French army, and the French Government made demand upon President Washington for his surrender for punishment, after he had been adjudged guilty in the courts of Pennsylvania. Sentence was postponed pending an examination of the question as to the right of the King of France to demand his surrender. There was no treaty between the United States and France on the subject of extradition. The Pennsylvania court held that no obligation to surrender existed in that case, and added:

> We think cases may occur, where council [then the supreme executive body of the State of Pennsylvania] should *pro bono publico*, and to prevent atrocious offenders evading punishment, deliver them up to the justice of the country to which they belong, or where the offenses were committed.

As the crime was committed on American soil, surrender in this case was refused, especially as our law had passed upon his offense and had a prior right to satisfy its sense of justice. It will be noted, however, that the court recognized the right of a nation to surrender in its discretion an offender, and while the idea that a State of the Federal Union has any control of the matter has long since been exploded, yet, substituting "the Federal Government" for the word "council," the court affirmed the right of the American Government to extradite if the public interests required it, even though there were no treaty.

In 1791 the Governor of South Carolina requested the President to demand of the Governor of Florida the

surrender of certain fugitives who had committed crimes in South Carolina. Florida was then a foreign State. The matter was referred to Thomas Jefferson as Secretary of State. He decided that "the laws of the United States, like those of England, receive every fugitive, and no authority has been given to our *executives* to deliver them up. If, then, the United States could not deliver up to General Quesnada (governor of Florida) fugitives from the laws of his country, we can not claim *as a right* the delivery of fugitives from us."

It will be noted that Mr. Jefferson only affirms that the *executive* branch of the Government has no right independent of treaty or act of Congress, of its own motion, to surrender a fugitive, and also that we have no right to *demand* such surrender to us. Nowhere, however, does he say that this Government, acting through its Congress and Executive, could not, as an incident of sovereignty, extradite, or that Florida could not surrender to us a fugitive.

In 1794 Jay's treaty was concluded between the United States and Great Britain, which incidentally provided for a reciprocal right of extradition. The Federal Government was first called to pass upon the question of the right to extradite independent of treaty in January, 1797, when the Kingdom of Spain demanded the surrender of one Jones, a criminal who had fled from Florida. Attorney-General Lee gave to the Secretary of State on official opinion on January 26, 1797, as follows:

> If a demand were formally made that William Jones, a subject and fugitive from justice, or any of

> our own citizens, heinous offenders within the dominion of Spain, should be delivered to their Government for trial and punishment, the United States are in duty bound to comply; yet, having omitted to make a law directing the mode of proceeding, I know not how, according to the present system, a delivery of such offender could be effected. To refuse or neglect to comply with such a demand, may, under certain circumstances, afford to the foreign nation just cause for war; who may not be satisfied with the excuse that we are not able to take and deliver up the offenders to them. This defect appears to me to require a particular law. (Opinions of the Attorneys-General, Vol. I, pp. 69 and 70.)

It will be noted that this opinion clearly recognized the obligation of the Government in its international obligations to surrender a fugitive criminal upon just cause, but claims that the Executive is paralyzed for want of an act of Congress providing the necessary means. Evidently no doubt existed in the Attorney-General's mind as to the right of Congress to provide such means, and in the case at bar the difficulty which arose in the Jones case does not exist, inasmuch as the act of June 6, 1900, empowers and authorizes Neely's extradition. The first formal deliverance by an American statesman, therefore, under the Federal Constitution distinctly affirmed the right of extradition independent of treaty stipulation, but only suggested that an act of Congress was necessary to enable the Executive to discharge this plain duty.

The famous case of Jonathan Robbins, which arose under the administration of John Adams, and played no inconsiderable part in the politics of that period, is of little

value for the purposes of the present case, as the extradition was there directed by the President in pursuance of the treaty stipulation in Jay's treaty. It is chiefly interesting because of the remarkable argument of John Marshall in the House of Representatives, whereby he vindicated the right of the Executive to carry out a treaty stipulation, even though Congress had not passed a law to give effect to it.

In 1819 the celebrated case of *Daniel Washburn* (4 John. Chan. Rep., 106) was heard and determined. Washburn had been brought before the court on a habeas corpus to determine the validity of his detention under a warrant of arrest to extradite him to Canada, where, it was alleged, he had feloniously stolen some money. The prisoner was discharged for lack of adequate proof that he had committed the offense, but the right to extradite was broadly affirmed by Chancellor Kent, who said:

> It is the law and usage of nations, resting on the plainest principles of justice and public utility, to deliver up offenders charged with felony and other high crimes, and fleeing from the country in which the crime was committed, into a foreign and friendly jurisdiction. When a case of that kind occurs, it becomes the duty of the civil magistrate, on due proof of the fact, to commit the fugitive, to the end that a reasonable time may be afforded for the Government here to deliver him up, or for the foreign government to make the requisite application to the proper authorities here, for his surrender. Who are the *proper authorities* in this case, whether it be the executive of the State, or, as the rule is international, the executive authority of the *United States*,

> the only regular organ of communication with foreign powers, it is not now the occasion to discuss. It is sufficient to observe, that if no such application be made, and duly recognized, within a reasonable time, the prisoner will then be entitled to his discharge upon *habeas corpus*. If the judicial authority has afforded sufficient means and opportunity for the exercise of this act of commutative justice, it has done its duty. Whether such offender be a subject of the foreign government, or a citizen of this country, would make no difference in the application of the principle; though, if the prisoner, as in this case, be a subject of the foreign country, the interference might meet with less repugnance.

The great chancellor abundantly fortifies his proposition as to the duty to extradite independent of treaty, not merely by references to the great writers on international law, but also by the citation of numerous cases in the English courts in which this view was taken. He affirms the proposition that an extradition treaty "only operates as a recognition, not a creation, of right." At the time this decision was rendered there was no extradition treaty, and this doctrine was therefore not *obiter dictum*.

A few years later, in August, 1823, the case of Edward Short was tried before the supreme court of Pennsylvania. (See *Commonwealth*, at the instance of *Short* v. *Deacon*, 10 Serg. & Rawl., 125.) Short was charged with having committed murder in Ireland and was arrested in Pennsylvania at the suit of a private person without the intervention of either Great Britain or the United States. The legality of his commitment was necessarily at issue.

Chief Justice Tilghman delivered the opinion of the court, and he so far modified the decision of Chancellor Kent as to say that no State had an absolute and perfect right to demand of another the delivery of a fugitive criminal, although it had what is called an "imperfect right;" that is, a right to ask it as a matter of courtesy, good will, and mutual convenience. This, of course, necessarily implied that the nation upon which the demand was made had a right of surrender, if it saw fit to exercise such courtesy and good will. The learned Pennsylvania chief justice then proceeded to decide that the delivery of a fugitive was the affair of the Executive Government, to which the demand of the foreign power must be addressed, and that the judiciary had no independent right of surrender. He affirmed the proposition that every nation had an undoubted right to surrender fugitives, but left undecided the question previously raised by Attorney-General Lee as to whether the President could discharge this duty unless empowered to do so by a law of Congress.

This authority, therefore, while contradicting the authority of Kent on the abstract proposition as to a binding *obligation* to surrender in the absence of treaty stipulations, yet agrees with Kent as to the only question which is pertinent to the case at bar, namely, that there was a power in our country, as in every sovereign nation, to surrender, although its exercise might require an act of Congress to provide the necessary means. While the prisoner was discharged, it was clearly on the ground that there was no case for international extradition at

all, as Short had been arrested at the suit of a private individual, and neither nation had taken any special action in the matter.

In 1832 the case of John L. Clark (9 Wendell, 212) was argued in the supreme court of New York, and, while the case is not in point on its facts, being a case of interstate rendition, yet it is interesting because Chief Justice Savage gave the weight of his testimony as to the duty of extradition. He said:

> Civilized nations have seen the necessity and propriety of surrendering fugitives from justice, that they may be tried by the laws of the country in which the offense was committed. This matter has usually been arranged by treaty; but where no treaty exists, the comity of nations requires that offenders against the laws of one nation shall not find a sanctuary in another.

The executive department of the Government has had the question of extradition under discussion on numerous occasions, and the various official communications with reference to such applications will be found in 1 Moore on Extradition, page 21, note 1. The various Secretaries of State and Attorneys-General who have passed upon the question officially have differed widely with respect to the abstract obligation to extradite in the absence either of a treaty or an act of Congress authorizing such extradition; but they have, with few exceptions, agreed that, *as a matter of public policy*, it would be politically inexpedient for the executive branch of the Government to surrender a fugitive criminal unless it was authorized to do so either by an act of Congress or a treaty stipula-

tion. In effect, they decline to take the exclusive responsibility, and as a principle of public policy this rule of action needs no vindication.

Mr. John Bassett Moore, in his exhaustive work on extradition, Vol. I, p. 21, sec. 16, summarizes these official decisions of the executive department of the Government by saying that "In the United States the general opinion has been, and practice has been in accordance with it, that in the absence of a conventional *or* legislative provision there is no authority vested in any department of the Government to seize a fugitive criminal and surrender him to a foreign power."

While this fairly states the doctrine of American publicists on this question, yet even such conclusion has not been by any means uniform. On the contrary, as is well-known, Secretary Seward asserted the right of the executive department, in the absence of a treaty or an act of Congress, to extradite a fugitive criminal, in what is known as the Arguelles case. This case is more particularly referred to in Appendix.

In the case at bar there is no necessity to contend, and no such suggestion is made, that the President, in the absence of either an act of Congress or a treaty stipulation, can extradite a fugitive criminal, especially if he be an American citizen. While Secretary Seward's opinion that he could, subject of course to the power of the judiciary to determine whether there is probable cause for the extradition, yet the case at bar does not require the application of that principle.

VIII.

DECISIONS OF SUPREME COURT AS TO RIGHT TO EXTRADITE INDEPENDENT OF TREATY.

The present accepted opinion is clearly stated by Mr. Justice Miller in the case of *U. S.* v. *Rauscher* (119 U. S., 408–411):

> It is only in modern times that the nations of the earth have imposed upon themselves the *obligation* of delivering up these fugitives from justice to the States where their crimes were committed, for trial and punishment. This has been done *generally* by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that there was no well-defined *obligation* on one country to deliver up such fugitives to another, *and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked;* and it has never been recognized as among those obligations of one government toward another which rest upon established principles of international law.

That the right of extradition and the duty to extradite may be properly exercised independently of a treaty, and that, therefore, a treaty does not narrow or restrict the right of a foreign nation to extradite, if its interests require such action, is shown in the case of *Ker* v. *The State of Illinois* (119 U. S., 436). In this case the defendant Ker was on trial in the criminal courts of the State of Illinois for larceny. He presented a plea in abatement which averred that he had been kidnaped in the city of

Lima, in Peru, and brought to this country for the purpose of subjecting him to this trial, and that such forcible kidnaping was in violation of an extradition treaty which existed between Peru and the United States, and which provided the only method of extraditing a fugitive criminal from one country to the other. It was further contended on his behalf that any extradition independent of the treaty was in violation of it, and therefore void. The Supreme Court, however, denied this proposition, and in its opinion, by Mr. Justice Miller, said:

> There is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind. It will not be for a moment contended that the Government of Peru could not have ordered Ker out of the country on his arrival, or at any period of his residence there. If this could be done, what becomes of his right of asylum?
>
> Nor can it be doubted that the Government of Peru could of its own accord, without any demand from the United States, have surrendered Ker to an agent of the State of Illinois, and that such surrender would have been valid within the dominions of Peru. It is idle, therefore, to claim that, either by express terms or by implication, there is given to a fugitive from justice in one of these countries any right to remain and reside in the other; and if the right of asylum means anything, it must mean this. The right of the Government of Peru voluntarily

> to give a party in Ker's condition an asylum in that country, is quite a different thing from the right in him to demand and insist upon security in such an asylum. The treaty, so far as it regulates the right of asylum at all, is intended to limit this right in the case of one who is proved to be a criminal fleeing from justice, so that, on proper demand and proceedings had therein, the government of the country of the asylum shall deliver him up to the country where the crime was committed. And to this extent, and to this alone, the treaty does regulate or impose a restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom.

In other words, the court ruled that the purpose of an extradition treaty was not to confer a right of asylum in all cases outside of the treaty, but to compel and provide a specific method for the extradition of prisoners in the class of cases mentioned in the treaty. An extradition treaty, while declaring the general moral obligation of a friendly nation to extradite a fugitive criminal when its own public interests do not forbid such action, deprives such nation of any discretion, and compels it, without reference to its peculiar interests, to surrender in consideration of a reciprocal surrender by the demanding nation in like cases.

To prevent any misapprehension, we beg to insist, as at the beginning of this brief, that our proposition is that when an act of Congress authorizes such extradition, and the nation has thus spoken through the organ of its will, the legislative body, that a fugitive criminal can be extradited in pursuance of such direct mandate of Con-

gress. This must be so, not only because of the obligation which the nation in its sovereign capacity owes to friendly nations not to give an asylum to criminals, but also because this nation "possesses the undoubted right to determine who shall compose its members," and the corresponding "right to expel from its territory persons who are dangerous to the peace of the state." That this inherent right exists has been established by this court in the case of *Fong Yue Ting* v. *United States* (149 U. S., 698), which throws a strong side light upon the discussion of the present question by showing that the right of the Federal Government, by virtue of its inherent sovereignty, to expel such as are deemed, by reason of race, physical condition, or want of moral character, to be unworthy of fellowship in our society, exists independent of treaty or of the implied powers thereby granted; that, in other words, this, as every Government, "possesses the undoubted right to determine who shall compose its members" and "the control of the people within its limits and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested."

In this case petitions for *habeas corpus* were granted on the application of three Chinese laborers who had been arrested and held by the marshal for deportation, under the provisions of an act of Congress excluding Chinese immigrants. It was alleged that this act of Congress violated the express provisions of a treaty, and that therefore the act of Congress was void. This court

held that the power to exclude or expel aliens is vested in the political department of the National Government, and is to be regulated by treaty *or* by act of Congress and to be executed by the Executive according to the regulations so established; that the power of Congress to expel, like the power to exclude, aliens may be exercised entirely through executive officers, and that the act of Congress is valid even though in contravention of stipulations of a prior treaty. This necessarily implies that there is this power to expel by act of Congress independent of the treaty-making power. The opinion, by Mr. Justice Gray, cites with approval the prior decisions of this court in *Nishimura* v. *United States* (142 U. S., 651–659), *Chae Chan Ping* v. *United States* (130 U. S., 581), and *Knox* v. *Lee* (12 Wall., 457), in all of which it was held that the right of expulsion was an incident to sovereignty and did not depend exclusively on the treaty-making power.

It is true that in the Fong Yue Ting case the right to deport was recognized in the case of foreigners, and there may be a distinction between the right of a foreigner to come here and the right of a citizen of the United States to return here after he has visited another country and violated its laws. The former had no rights as a citizen; the other had acquired rights. But a citizen may forfeit his right by becoming an enemy of the state through the commission of crime. Daily in our courts we restrain a man of his liberty, sometimes for life, and frequently strip him of citizenship as a penalty for violating our laws. Indeed, for exceptional crimes, we take not merely

his liberty and citizenship, but his life as well, even though he be an American citizen. If, therefore, the Government has this right, it has an equal right, in accordance with the usages of nations, to compel a citizen to go to another country to stand trial for an offense when there is probable cause for believing that he has violated and abused the hospitality of that country by the violation of its laws.

The right to deport for these purposes is surely no greater infraction of personal liberty than the right to punish crime in our country. In each case the justification is the well-being of the state, and the greater cause of justice to which all nations are dedicated, and to promote which they are formed. For this reason the right of a sovereign nation to extradite has never been regarded by any nation as affected by the question of the citizenship of the offender, although such citizenship may, as a matter of public policy, affect the exercise of the right. The political department of a government will be less disposed to extradite one of its own citizens, but its right to do so is equally good, whether the fugitive criminal be a citizen or a foreigner. The Fong Yue Ting case, therefore, is not inapplicable because Fong Yue Ting was a foreigner, for the reason that in that case the right to deport was not placed upon the commission of a crime by Fong Yue Ting, but was simply in the exercise of the right of a sovereign state to determine "who shall compose its members."

30190

IX.

POLICY OF EXTRADITION FOR EXECUTIVE AND CONGRESS.

(*c*) *That the question as to whether a fugitive criminal should be surrendered as a matter of public policy is not a judicial question, but is solely and exclusively for the political department of the Government.*

We apprehend that upon this proposition there can and will be no serious dispute. Assuming that there is a constitutional power to extradite, either in the Executive alone or in the Executive and Congress, it can not be doubted that the propriety of its exercise is purely for the political branch of the Government, and that the court could not judicially determine that the extradition of Neely was unnecessary. The judicial branch of the Government is called upon to determine, under the act of Congress, whether there is probable cause, but it acts as an auxiliary to the political branch of the Government in this respect. This ancillary function of the courts is illustrated and vindicated in the case of *Fong Yue Ting* v. *United States* (*supra*), and only a reference to it is now necessary.

If it be within the power of the Government to compel a foreigner or citizen to answer a charge in the courts of a friendly country, and such power can not be seriously questioned, then, to quote the famous doctrine of Chief Justice Marshall in *McCulloch* v. *Maryland* (4 Wheat., 316):

> The sound construction of the Constitution must allow to the national legislature that discretion, with

respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

X.

CHIEF FALLACY OF APPELLANT'S ARGUMENT.

Before passing to the second branch of our argument, we wish to call attention to the fallacy which runs through the appellant's brief, which is that an extradition statute is an attempt to legislate for a foreign country. His contention is that the act of June 6, 1900, is unconstitutional because it attempts to legislate for the island of Cuba, which is claimed to be the territory of a friendly power. If this were so, every extradition statute would of necessity be unconstitutional, for all such statutes have reference to the extradition of men to other countries than our own. The fallacy of the argument is shown by the fact that such statutes operate here and not in foreign countries. The fugitive is found here, is arrested here, the case is heard here, and he is surrendered here to the representative of such foreign country. The act of June 6, 1900, does not differ in this respect from the previous extradition statutes. It operates in this country and is designed to detain the fugitive pending a hearing, to give him a hearing before the courts of our country in order to ascertain whether there be probable

cause for the surrender, and to commit him until the Secretary of State shall authorize his surrender. The suggestion that this is an attempt to legislate for a foreign country is certainly novel, but without reason or authority to support it.

The appellant seeks to avoid the force of this suggestion by arguing that the act of June 6, 1900, is unconstitutional because it contemplates an extradition to Cuba, where, as he contends, the President, as Commander in Chief, has, since the treaty of Paris, maintained a government in excess of his power and in defiance of the Constitution. He does not question that the government there maintained is the *de facto* and only government, and we might argue that the right to extradite to a *de facto* government in a foreign country is not affected by any consideration of its lawfulness. If, for example, we extradite a fugitive to France, the court does not stop to inquire whether the legitimate government in France is the kingdom of the Orleanist, the empire of the Bonapartist, or the Republic. It is enough that there is a *de facto* government administering criminal laws. If any question as to its legitimacy becomes important, such question is exclusively for the Executive.

Assuming, however, that we are wrong in this contention, it remains for us to pass to the second part of this argument, which seeks to demonstrate our right to govern Cuba in accordance with the law of belligerent right and the right of Congress to enact legislation to aid the Commander-in-Chief in maintaining such government.

PART II.

THE RIGHT OF THE UNITED STATES TO GOVERN CUBA.

Hitherto counsel for the Government have endeavored to sustain the constitutionality of the act of June 6, 1900, and the extradition of Neely thereunder by reference to the law of extradition and the right of the Government which it has always claimed and exercised to extradite fugitive criminals. Counsel now proposes to justify this legislation and the removal of Neely to Cuba upon broader grounds, namely, the right of this Government as a sovereign power to govern Cuba as conquered territory which by virtue of the war-making and treaty-making powers it is lawfully occupying.

In this connection we submit three propositions:

(1) The United States is at the present time, under the law of belligerent occupation, the *de facto* and *de jure* sovereign in the island of Cuba, and as such is possessed of all essential attributes of sovereignty, and such sovereignty is not affected by the fact that its duration may be limited in time or exercised for a specific object.

(2) Exercising such sovereignty, the United States has the power, and it is its duty, under the treaty of Paris, to enact such legislation as will aid the President to protect life and property in Cuba.

(3) That such sovereignty is a political and not a judicial question, and its exercise by the political department of the Government conclusively binds the judges as well as all other officers, citizens, and subjects of that Government.

XI.

The United States is at the present time, under the law of belligerent occupation, the de facto and de jure sovereign in the island of Cuba, and as such is possessed of all essential attributes of sovereignty, and such sovereignty is not affected by the fact that its duration may be limited in time or exercised for a specific object.

In discussing the first of these propositions we reach the substantial objection which the appellant urges against the constitutionality of the act, for his contention is, in substance, that as Congress has recognized that the people of Cuba are free and independent, and as the war with Spain has terminated by a treaty of peace, the continued occupation by our Government of such island is unconstitutional. To quote his language—and to indicate to this court the serious nature of his objection—he says (paragraph 23 of his petition):

> That there is no authority in the Constitution of the United States for the occupation or control by the United States of the territory of a friendly foreign nation or for the government of such foreign territory by the United States by martial law or otherwise in time of peace, and that the form of government now maintained by the United States in Cuba is wholly illegal and without authority under the Constitution of the United States.

In deciding this question this court is not bound by the averments of the petition for the writ of *habeas corpus*. The mere assertion by Neely that the present government of the island of Cuba is a usurpation is not conclusive upon this court, which can and is bound to take judicial cognizance of the historic facts in the matter.

This was clearly held to be the law in the case of *Jones* v. *United States* (137 U. S., 202), in which the vital question was whether this Government had any lawful jurisdiction over the island of Navassa in the Caribbean Sea. In delivering the opinion of the court Mr. Justice Gray said (p. 214):

> All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence nor in accord with the pleadings. *United States* v. *Reynes*, 9 How., 127; *Kennett* v. *Chambers*, 14 How., 38; *Hoyt* v. *Russell*, 117 U. S., 401, 404; *Coffee* v. *Grover*, 123 U. S., 1; *State* v. *Dunwell*, 3 R. I., 127; *State* v. *Wagner*, 61 Maine, 178; *Taylor* v. *Barclay* (2 Sim., 213) and *Emperor of Austria* v. *Day* (3 De G., F. and J., 217, 221, 233), above cited; 1 Greenl. Ev., § 6.

XII.

THE MEANING OF A SOVEREIGN STATE.

Before passing to such sources of information it may be well to define clearly the expression "sovereign State." Halleck in his work on international law, edited by Sir

30193

Sherston Baker, ed. 1893, Vol. I, p. 66, defines a sovereign State as "any nation or people organized into a body politic and exercising the rights of self-government." He adds: "A State is distinguishable from a nation or a people, since the former may be composed of different races of men, all subject to the same supreme authority." Thus the Jewish people, the Polish nation, the race of Gypsies, are none of them sovereign States.

"The marks of an independent State are that the community constituting it is permanently established for a political end, that it possesses a definite territory, and that it is independent of external control." (Halleck's Int. Law, p. 18.)

"The sovereignty of a State is its inherent right to exercise jurisdiction over all questions arising within its territorial limits, and to control and regulate the actions and relations of all its citizens or subjects." (Davis's Outlines of International Law, p. 28.)

Sovereignty is not a name or an assertion, but a fact. It means "the possession or exercise of supreme authority." This, as has been stated, is a question of fact, and the fact can not be affected by mere words.

> No doubt one state may place itself under the protection of another without losing its international existence as a sovereign state, if it retains its capacity to treat, to contract alliances, to make peace and war, and to exercise the essential rights of sovereignty. But these rights must be retained *de facto* as well as *de jure*, for although a state may retain the forms of independence, if it be practically

> and notoriously governed by officers appointed by another state, and incapable of exercising its own volition, it will be regarded as a mere dependence of the governing power. (1 Halleck's International Law, 3d ed., p. 69.)

Measured by this standard, it would seem to be perfectly obvious in the first place that the inhabitants of Cuba, while a people, and possibly forming a nation, do not at the present time maintain of themselves a sovereign State, and as a matter of fact, do not exercise any sovereign powers of their own volition; and in the second place that the United States, acting through the Commander in Chief, has at the present time, as the appellant himself avers in his petition, "all executive, legislative, and judicial power over the affairs of the island of Cuba and over the Cuban people," and is thus the sovereign power in Cuba for the time being. Admittedly, it is the *de facto* government. By virtue of the right and duty of the Government to carry out the stipulations of its treaties, it is likewise the *de jure* government of Cuba. The Cuban people have at the present time no essential right of a sovereign State. They have no "capacity to treat, to contract alliances, to make peace and war," nor even "the form of independence" to which Halleck refers in the paragraph cited. They have no government, for, notoriously, they are now endeavoring by means of a constitutional convention to construct a government to which the United States can and probably will commit the future control of the island. (See Appendix V, p. 122.)

XIII.

THE CUBAN REVOLUTION.

The learned counsel for the appellant has devoted a considerable portion of his able brief to an exhaustive history of the Cuban revolution, and he claims that this establishes the fact that there was a government in Cuba prior to the treaty of Paris, and that this country had recognized such country as an independent and sovereign nation. While we might object to much of the matter which the learned counsel for appellant has inserted in this portion of his argument as not being sufficiently official to require this court to take judicial cognizance of it (as, for example, the voluminous quotations from the statements of Mr. Palma, whom this Government declined to receive as a representative of the alleged government), yet such objection is not necessary, as all of the matter quoted, while forming an interesting history of the Cuban revolution, is singularly inconclusive in establishing the desired proposition that this Government ever recognized a government in Cuba.

On the contrary, appellant's counsel has unwittingly established the very converse of his proposition by showing that this Government both before the Spanish-American war began and subsequent to the treaty of Paris uniformly refused to recognize the alleged Cuban government, or to treat with it as such. And as appellant's counsel admits that the action of the political branch of the Government is binding upon this court, a proposition in which we heartily concur, it follows neces-

sarily that this court must accept the view of the political branch of the Government, that there is not and never has been a Cuban government possessing sufficient attributes of sovereignty to warrant its recognition by the family of nations.

In this connection, care must be taken to distinguish between a recognition of the existence of a *people* and recognition of the existence of a *nation*. It has already been pointed out that these are not convertible terms. Congress, by the joint resolution of April 20, 1898, did unquestionably recognize that there was a Cuban *people*, which, by a successful insurrection, had become practically independent of the rule of Spain; but not only in selecting the word "people" instead of the word "nation," but in defeating and excluding the proviso which called for the recognition of the "Cuban republic," Congress emphatically excluded the idea that there was any nation sufficiently organized to warrant recognition. The reports of Senate committees, quoted by appellant to show the existence of an insurgent government, are valueless when the same reports contained the admission that the United States had refused to recognize its accredited representative. The appellant has shown that Mr. Palma, as the accredited diplomatic delegate of the alleged republic of Cuba, asked that he be received and recognized as such, and that such reception and recognition were uniformly refused. Moreover, attempts which were made in Congress to recognize the Cuban republic were, as stated by the appellant, defeated, and we are at a loss to know what possible value there is in quoting the reports of

committees which urged that such resolution should be adopted. In all attempts by Presidents Cleveland, Harrison, and McKinley, made to bring to an end the insurrection in Cuba, our country dealt directly with Spain as the recognized sovereign in Cuba, and our country has uniformly refused even to recognize the insurgents as belligerents.

Even after the explosion of the *Maine*, the President, on March 27, 1898, as stated in appellant's brief, submitted to the Spanish Government suggestions that the President would use his good offices to bring to an end the insurrection. (Appellant's brief, p. 27.) Some nine resolutions were offered in Congress, all looking toward the recognition of the Cuban republic, none of which was ever passed by Congress. We agree with appellant's counsel that if they had been passed they would not have been binding on the Executive, as the recognition of a new State is the exclusive function of the executive and not of the legislative department of the Government.

On April 11, 1898, the President addressed a message to Congress in which he asked for authority "to take measures to secure a full and final termination of hostilities between the Government of Spain and the people of Cuba, and to secure in the island the establishment of a stable government." The distinction between the "Government" of Spain and the "people" of Cuba will be noted, and also the fact that the effort of the President was not to recognize an existing government in Cuba, but "to secure the establishment of a

stable" one. In this message the President said, with especial reference to the subject under discussion:

> It is to be seriously considered whether the Cuban insurrection possesses beyond dispute the attributes of statehood, which alone can demand the recognition of belligerency in its favor. The same requirement must certainly be no less seriously considered when the graver issue of recognizing independence is in question. * * * Such recognition is not necessary in order to enable the United States to intervene and pacify the island. To commit this country now to the recognition of any particular government in Cuba might subject us to embarrassing conditions of international obligation toward the organization to be recognized. In case of intervention our conduct would be subject to the approval or disapproval of such government. We should be obliged to submit to its direction and to assume to it the mere relation of a friendly ally.

The Senate committee thereupon recommended a resolution, the first paragraph of which read as follows:

> First. That the people of the island of Cuba are, and of right ought to be, free and independent, *and that the Government of the United States hereby recognizes the republic of Cuba as the true and lawful government of the island.*[1]

The report of the committee, which is fully quoted in appellant's brief (p. 30), shows that the committee did not think that there then existed a responsible and stable government, for the first paragraph (appellant's brief, p. 30) contemplates the recognition of "the independence of the people of Cuba," the intervention of the United

[1] The portion italicized was stricken out by Congress.

30196

States to terminate the war, and then it significantly adds, "and that such independence shall become a settled political fact at the earliest possible moment by the establishment by the free action of the people of Cuba, *when such action can be had*, of a government independent in fact and form."

If, therefore, the committee's views are of any binding value, they did not contemplate the continuance of the alleged Cuban republic, but the creation by the people of Cuba of a new government when the war had terminated; and this was accepted by Congress when it struck out of the first paragraph of the resolution the recognition of "the republic of Cuba as the true and lawful government of the island."

The second paragraph, far from recognizing the Cuban republic, recognizes the Government of Spain as the *de facto* government in Cuba, for it provides that "the Government of the United States does hereby demand that the Government of Spain at once relinquish its authority and government of the island of Cuba, and withdraw its land and naval forces from Cuba and Cuban waters."

While Congress did, in the fourth paragraph of the joint resolution, disclaim "any disposition or intention [on the part of the United States] to exercise sovereignty, jurisdiction, or control over said island," yet it so far qualified this disclaimer as to say "except for the pacification thereof, and asserts its determination when that is accomplished to leave the government and control of the island to its people." This clearly indicates the intention of the United States to intervene and control and govern the island, in order to pacify it, and only to relinquish such

government and control when its pacification is accomplished. It will also be noted that such control is to be relinquished, after the period of pacification, "to its people." In all of these state documents the utmost care has been taken to distinguish between the people of Cuba and any alleged Cuban state or nation.

If any doubt existed as to the intention of this Government at the outbreak of the war, subsequent events make it clear beyond question that this Government never recognized the Cuban nation. Thus the act of April 25, 1898, which formally declared war (appellant's brief, p. 35), provides "that war be, and the same is hereby, declared to exist, and that war has existed since the 21st day of April, 1898, including said day, between the United States of America and the Kingdom of Spain." It will be noted that the alleged Cuban republic is expressly excluded, and this is the more striking as the Cuban insurgents were never recognized as belligerents. If there had been any intention to recognize the insurgent government the resolution would have read that war existed "between the United States of America and the republic of Cuba, on the one hand, and the Kingdom of Spain."

The entertaining account of the war which is set forth in appellant's brief does not in any wise impair these conclusions or strengthen his proposition. That the Cuban insurgents did cooperate with our armies is unquestionably true; but our acceptance of such cooperation simply made them our soldiers and no more operated as a recognition of their government than our acceptance of the

assistance of Aguinaldo operated as a recognition of the alleged Philippine republic.

A nation may accept the assistance of organized bodies of men without recognizing that they are the official army of a recognized nation. Thus the great Napoleon accepted the assistance of the Poles, but he refused to acknowledge the independence of Poland as against Russia.

This conclusion is made entirely clear by the following facts:

When Santiago capitulated it was to the United States Government and not to the United States Government and the Cuban republic. Upon such capture the United States at once asserted exclusive sovereignty in Santiago. See Executive order of the President, dated July 13, 1898, promulgated by authority of the Secretary of War, quoted in appellant's brief, p. 44, in which he asserted the exclusive authority of the United States and excluded the suggestion that the people of Cuba owed any allegiance to any other power. Thus the President says:

> The judges and the other officials connected with the administration of justice may, *if they accept the supremacy of the United States*, continue to administer the ordinary law of the land as between man and man, under the supervision of the American Commander in Chief.

Had our Government recognized the existence of a Cuban republic, it is manifest that such claim could only be an unfriendly act to the Cuban republic. It is not to be assumed that the United States, with one war on its hands, was virtually declaring war on another government, and that government, according to appellant's contention, our ally. The more reasonable assumption is

that there was no intention to recognize the Cuban government, and that, therefore, under the law of nations the sovereignty of Santiago and the surrounding territory passed from the conquered to the United States as conqueror.

The signing of the protocol of August 12, 1898, fully confirms this view. In no way does it suggest the existence of a Cuban government as a factor in the case. The alleged Cuban republic was not a party to it, or in any way recognized by its terms. It was purely a provisional treaty between the representatives of the United States and Spain. (See 30 Stat. L., p. 1742.)

In accordance with the protocol the United States and Spain each sent five commissioners to Paris. The alleged Cuban republic neither asked to be represented by its own commissioners, nor was it represented at the sessions of the Peace Commission. If the Cuban people had been of opinion that their government was a government in fact (and not in mere name), it is inconceivable that they would not have claimed representation upon the Peace Commission in a matter affecting themselves and their own country. The treaty, like the protocol, disproves the whole theory upon which appellant's counsel bases his argument. In none of its many paragraphs is there any recognition of a Cuban government. The only signatory parties are the United States and Spain. Article I directly provides for a transfer of both the authority and the responsibility for the government of Cuba by Spain to the United States. It says:

> Spain relinquishes all claim of sovereignty over and title to Cuba.

> And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

Article XVI expressly excludes the assumption that the alleged Cuban republic in any way shared either this authority or these obligations, for it provides that, after the United States has terminated its occupancy of Cuba, it will advise any government established in the island *to assume the same obligations.* The paragraph in full is:

> It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will upon the termination of such occupancy advise any government established in the island to assume the same obligations. (30 Stat., 1761.)

This treaty was, of course, ratified by the Senate and became the law of the land, and if it be true, as contended by appellant, that the joint resolution of April 20, 1898, operated as a recognition of the Cuban republic, then it was competent for this country, in adopting a treaty, to withdraw such recognition, and such is the effect of both the protocol and the treaty of Paris.

The events which followed the treaty of Paris, and described at length in appellant's brief, equally disprove his theory that the Cuban republic was ever recognized by this Government. They show that the United States at once assumed, and still maintains, exclusive sovereignty. Thus, on January 1, 1899, the Spanish Governor-General made formal surrender of Cuba to the United

States. (Appellant's brief, p. 54.) The American and not the Cuban flag was at once raised as a symbol of dominion. The alleged Cuban government, far from complaining at this course, at once recognized both its justice and wisdom. Its army disbanded and accepted payment from the Treasury of the United States. Its civil government, if it had any, dissolved as quickly, and from that day to this there has not been even the pretense of an independent government in Cuba, or any claim for recognition as such. On the contrary, the court will take judicial cognizance of the fact that the Cuban people, under the supervision and control of our Government, are now met in constitutional convention, not for the purpose of amending any constitution or continuing any government which they had, but to create and form an entirely new one. (See Appendix V, p. 122.)

If any doubt could possibly remain, the action of Congress conclusively determines the question, for we entirely agree with the appellant's counsel that this court must accept the action of the political department of the Government. There may be a question as to whether the Executive or Congress, or both together, have the right to recognize, or to refuse to recognize, a new government; but in this case both the Executive and Congress have until the present time refused to recognize the Cuban government, and have consistently recognized, since the treaty of Paris, our own Government as the sovereign power in Cuba. (See acts of Congress cited in appellant's brief, pp. 65–67.)

The very act which is now under consideration by the court was admittedly passed by Congress with direct

reference to the island of Cuba and with the purpose of aiding the President to govern it as long as it is subject to the dominion of the United States.

The fact that our sovereignty may be temporary in character can not affect its essential nature. Sovereignty is none the less sovereignty, even though it be voluntarily or involuntarily terminated.

In *Leitensdorfer et al.* v. *James J. Webb* (20 Howard, 176) it appears that the Army of the United States, having acquired by conquest in 1846 part of the territory of New Mexico, General Kearny, who held possession for the United States by virtue of the power of conquest and occupancy, etc., under the sanction and authority of the United States, directed a provisional or temporary government for the acquired territory and instituted a provisional judicial system.

The court held, among other things:

> Of the validity of these ordinances of the provisional government there is made no question with respect to the period during which the territory was held by the United States as occupying conqueror, and it would seem to admit of no doubt that during the period of their valid existence and operation these ordinances must have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them.

In that case it was contended that whatever may have been the rights of the occupying conqueror, as such, they were all terminated by the termination of the belligerent attitude of the parties, and that at the close of the contest every institution which had been overthrown or suspended would be revived and reestablished.

The court, in passing upon such contention, says:

> The fallacy of this pretension is exposed by the fact that the territory never was relinquished by the conqueror, nor restored to its original condition or allegiance, but was retained by the occupant until possession was matured into absolute permanent dominion and sovereignty.

The leading case of *Cross* v. *Harrison* (16 How., 164) is to the same effect and seems conclusive of this branch of the argument. In that case the President had, during the Mexican war, taken possession of California as conquered territory. Early in 1847 he authorized the military commander in California to form a civil government for the conquered country, and, *inter alia*, to impose duties on imports as military contributions. A treaty of peace was signed February 3, 1848, and ratifications exchanged on May 30, 1848. On March 3, 1849, Congress made the port of San Francisco a collection district, and on November 13, 1849, a collector of the port, appointed by the President, entered upon the execution of his duties. The duties under the war tariff were collected from the ratification of the treaty to the day that the collector entered upon his duties, and this court held that they were rightfully exacted. In so holding the court affirmed the legality of the military government which existed after the treaty of peace and the cessation of hostilities and until Congress had legislated for the civil government of California. Mr. Justice Wayne says:

> The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated

30200

for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power also to admit new States into this Union, with only such limitations as are expressed in the section in which this power is given. The government, of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the government. And the more so as it was continued until the people of the territory met in convention to form a State government, which was subsequently recognized by Congress under its power to admit new States into the Union.

Again the court says:

Our conclusion, from what has been said, is that the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the

> treaty or from its ratification. We think it was continued over a ceded conquest without any violation of the Constitution or laws of the United States, and that until Congress legislated for it the duties upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, according to instructions from Washington, from Governor Mason.

This court will take judicial cognizance as to the purpose of the present occupation of Cuba. The authoritative declaration of the President, in his message of December 6, 1898, may be noted:

> As soon as we are in possession of Cuba and have pacified the island, it will be necessary to give aid and direction to its people to form a government for themselves. * * * Until there is complete tranquillity in the island and a stable government inaugurated military occupation will be continued.

The declaration of Congress meant nothing more than that the inhabitants of Cuba, by long sacrifices, had earned their independence, and that, on the other hand, Spain, by her misrule, had, according to ethical standards rather than by any canon of international law, forfeited her moral right to rule the Cuban people further. This assertion of an ethical principle was fortified and made good by altogether different cannon, and by force of arms we compelled Spain to relinquish her title to Cuba. But we did not compel her to cede such sovereignty or title to us or to any other power, but simply provided that we should occupy it, and that, pending such occupation, this nation should be responsible for the protection of life and property.

30201

This court, as has been stated, will take judicial cognizance of the fact that, with our approval, and under our supervision, the Cuban people are now assembled through their representatives in constitutional convention, and that, if they shall succeed in organizing a government which gives assurance of ability to rule Cuba, this nation can then abandon its occupation and surrender its rights and responsibilities to such new government. But it is evident that such time has not yet arrived. The Cuban constitutional convention may decline to form a government, and ask for admission into the United States either as a State or Territory. It may, on the other hand, organize a government with which this country will not be satisfied; or this country may ask such indemnity for its undoubted sacrifices that the Cuban government may be unable or unwilling to meet the demands of this Government, just or unjust. In other words, there is no Cuban government at the present time, and no certainty that there ever will be one. (See Appendix V, p. 122.)

This anomalous condition is by no means without precedent. By a convention made between Turkey and Great Britain June 4, 1878, Turkey agreed "to assign the island of Cyprus to be occupied and administered by England," in order to enable her to execute certain engagements in the treaty, Cyprus to be evacuated and restored if Russia restored certain conquests made in Armenia. It was stipulated that the Sultan "transferred to and vested in Her Majesty the Queen for the term of occupation and no longer, full powers for making laws and conventions for the government of the island in Her

Majesty's name * * * free from the Porte's control. (1 Halleck's International Law, 3d ed., p. 70, note.)

This is virtually an occupation in trust, to be terminated upon a contingency specified.

The international convention of November 17, 1885, put the British in military occupation in Egypt to restore order and secure the holders of the Egyptian bonds, to be terminated upon "the assurance of the stability and successful operation of the Egyptian Government." (6, Calvo, Droit International, pp. 14, 15.) This is a trust, so to speak, for the Egyptian bondholders (subjects of the signatory powers), with a remainder over to the sovereign power, the Porte.

All these examples show that powers may, by treaty, assume something less than the absolute responsibilities of annexation, and something more than mere protectorates.

Ortolan recognizes (Diplomatic de la Mer, liv. ii, ch. xiii) "definitive occupation" as well as "incorporation" of a subject territory, as subjecting it to military government. While the superior power is in "exclusive possession" of foreign territory, other nations must respect it as the territory *pro tempore* of the power in possession, as alone able to fulfill international obligations. (2 Halleck, 3d Edn., 444, citing *Fleming* v. *Page*, 9 How., 615.)

To sum up, the United States assumed control of Cuba by conquest, confirmed by treaty, in which it limited its own occupation by the happening of a definite contingency, of which it is the final and only judge.

3020

XIV.

CUBA, TERRITORY PRO TEMPORE, OF UNITED STATES.

Cuba is therefore "territory *pro tempore*" of the United States. The President is not, therefore, as contended by appellant, setting up "a military government in a friendly State in a time of peace," for Cuba is not a State at all; on the contrary, Cuba at present is territory of the United States, occupied by our soldiers, both under the war-making power and under the treaty-making power, and, under the treaty of Paris, it is wholly a question for the political branch of the Government when, and if ever, such military occupation shall cease.

If it be argued that "territory *pro tempore*" is without constitutional authority, it can be said that, while such a possibility may not be expressly recognized in the Constitution, yet, when its framers gave to the Federal Government the power to make war and conclude treaties, it did not pretend to prescribe the bounds or limits of such authority. In concluding a war and securing the fruits of conquest, military occupation is necessarily implied in the war-making power, and if this were not so, it must be clear that the power to make a treaty must carry with it a right to make some disposition of the conquered country. No one ever questioned this until the present case.

XV.

POLITICAL DEPARTMENT EXCLUSIVE JUDGE OF NECESSITY OF OCCUPATION.

Conceding, therefore, the right to make such a treaty, there must be the right to carry it out, and, if there be the right to carry it out, there must be the right to employ such means as may be necessary for such purpose; and these means are left to the political branch of the Government. It is therefore a question either for Congress, or for the President, or both, when to determine the period of military occupation. Thus, "in February, 1866, it was resolved by Congress that the condition of the former Confederate States fully justified the President in maintaining the suspension of the writ of *habeas corpus* in those States, and that the condition of those States fully justified the President in maintaining the military possession and control of them." (2 Halleck, 3d ed., p. 443, note.)

In 1866 Congress approved the President's act in continuing military "pacification" of "friendly States" where a condition of "peace" obtained with the surrender at Appomattox.

In 1899, after the establishment of "peace" in Cuba by the ratification of the Spanish treaty, Congress expressed its approval of the military occupation of the island, which it is here contended is usurpation.

An act was before them for the maintenance of the Regular and Volunteer Army. This was passed with a proviso limiting the scope of the military government of Cuba in one particular only, and by implication approv-

ing it and consenting to its continuance as a military measure. (See 30 Stat., ch. 423, sec. 2, p. 1074):

> That no property, franchises, or concessions of any kind whatever shall be granted by the United States, or by any military or other authority whatever, in the island of Cuba during the occupation thereof by the United States.

Little need be said upon this branch of the argument, as the learned counsel for appellant concedes it if the original treaty be constitutional. (See *New Orleans* v. *Steamship Co.*, 20 Wall., 387.)

XVI.

Exercising such sovereignty, the United States has the power, and it is its duty, under the treaty of Paris, to enact such legislation as will aid the President to protect life and property in Cuba.

Given, therefore, the power to protect life and property in Cuba, as we are obliged to do under our treaty stipulations, there must be as the very first necessity the right either to recognize the civil courts which were in existence at the time the war was declared, or, if the exigencies of the case require it, to create new courts; and if there is power to erect courts or recognize existing ones, there must be the equal power to provide procedure for the administration of justice therein; and if there is such power, then, as part of such procedure, it follows as a necessary conclusion that Congress can provide for the transfer of a criminal from where he is found to the place where he committed his offense.

Such legislation has long been in force in this country,

and is embodied in section 1014 of the Revised Statutes, whereby it is provided that—

> For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

The appellant squarely denies the right of this country to legislate for Cuba. He claims, in effect, that this court should determine that its further occupation by the United States is without justification, and that, therefore, all legislation which has been made to carry out our treaty obligation to protect life and property is void for want of authority. His contention, carried to its logical conclusion, is that if Neely had set fire to the city of Habana or had assassinated one of the judges of the courts and had

3020

fled to the United States, our country is so impotent to discharge its treaty obligations that it can not legislate for the removal of the fugitive to Cuba.

Fortunately the United States is no such weakling. In its foreign relations at least it lacks no attribute of a sovereign and independent power. By the great declaration which constituted it a people it was asserted that "As Free and Independent States, they have *full Power* to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." Moreover, in the same great instrument the spirit in which our international relations were to be conducted was indicated by the immortal preamble, than which its great writer never sounded a truer or nobler note. It recites that, "When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation."

In other words, the great declaration recognized that the new nation was one of a family of nations, and that this family of nations constituted a government—the government of civilization—bound by a law which was equally obligatory upon each member of the family, and that this law of international obligation rose higher than the selfish interests or peculiar policies of any one people. Moreover, it can be urged that the very weakness

of the nation under the Articles of Confederation in discharging its international obligations to other powers caused it to enact the Constitution of the United States; for the object, as stated, "to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defense, promote the general Welfare."

As was said by Mr. Justice Bradley in the *Legal Tender Cases* (12 Wall., 554):

> The Constitution of the United States established a government, and not a league, compact, or partnership. It was constituted by the people. It was called a government. In the eighth section of Article I it is declared that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof. As a government it was vested with all the attributes of sovereignty. * * *
>
> The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country—war, peace, and negotiations and intercourse with other nations; all which are forbidden to the State governments. * * *
>
> Such being the character of the General Government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which at the time of adopting the Constitution were generally considered to belong to every government as such, and as being essential to the exercise of its functions. If this proposition be not

> true, it certainly is true that the Government of the United States has express authority in the last clause quoted to make all such laws (usually regarded as inherent and implied) as may be necessary and proper for carrying on the Government as constituted and vindicating its authority and existence.

As to the binding force of the law of nations the Supreme Court has spoken in no uncertain terms in the very recent case of *The Paquete Habana* (175 U. S., 677–700), where it is said:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.

While the power to govern Cuba, and, incidentally, to punish crime therein, can be properly traced to the power to make war, and the equal power to make treaties, yet it can also be placed upon the broader ground of the inherent right of the United States as a sovereign power to govern that which it acquires. To quote the language of this court in *Jones* v. *United States* (137 U. S., 212):

> By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one

nation, in its name and by its authority or with its assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. (Vattel, lib. I. c. 18; Wheaton on International Law, 8th ed., §§ 161, 165, 176, note 104; Halleck on International Law, C. 6, §§ 7, 15; 1 Phillimore on International Law, 3d ed., §§ 227, 229, 230, 232, 242; 1 Calvo Droit International, 4th ed., §§ 266, 277, 300; *Whiton* v. *Albany Ins. Co.*, 109 Mass., 24, 31.)

In this connection it must be observed that the extent of sovereignty is not coterminous with acknowledged territorial boundaries. There is an extraterritorial sovereignty, both as an abstract and as a practical proposition. The exclusive sovereignty of the United States may be confined to its territorial domains, but beyond these domains its sovereignty extends concurrently with that of other nations wherever there is no exclusive sovereignty in another nation. Thus the United States exercises sovereignty on the high seas, as does every other nation. As has been shown by international law, sovereignty follows the flag of a conquering army, even though conquered territory does not thereby become a portion of the country as a political entity.

Fleming v. *Page* (9 How., 603) and *United States* v. *Rice* (4 Wheat., 246) both illustrate this fact. In the

former, Tampico had been captured by our army in the year 1847, and it was claimed that as it was subject to our jurisdiction and control and under our dominion, it had ceased to be foreign to us and had become a part of the United States, and that therefore goods imported into the port of Philadelphia from Tampico during its occupation by our troops were not subject to the payment of tariff duties under our revenue laws. This court held, however, that while it was internationally, i. e., as against other nations, the territory of the United States, yet it was not a part of the Union within the meaning of the Constitution. Chief Justice Taney said:

> A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the Government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As Commander in Chief he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States,

But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.

It is true, that when Tampico had been captured and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possessions continued, as the territory of the United States, and to respect it as such; for, by the laws and usages of nations, conquest is a valid title while the victor maintains the exclusive possession of the conquered country. * * * *As regarded by all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries; but yet it was not a part of the Union*, for every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws; and the relation in which the port of Tampico stood to the United States while it was occupied by our arms did not depend upon the law of nations, but upon our own Constitution *and acts of Congress*. (*Fleming* v. *Page*, 9 How., 603, 615.)

In the latter case of *United States* v. *Rice*, the port and town of Castine, in the State of Maine, was captured by the British troops on September 1, 1814, and was held until the conclusion of the war in February, 1815. During this period the British Government exercised all civil and military authority over the place and established a custom-house and admitted goods to be imported according to regulations established by itself. After the conclusion of the treaty of peace and the surrender of Castine to our troops our Government sought to collect the tariff duties on goods which had been imported into Castine by one of its citizens. In an opinion by Mr.

Justice Story this court held that such duties could not be exacted, and said:

> By the conquest and military occupation of Castine the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty there can be no claim to obedience.

That our occupation of Cuba is now under the treaty-making and no longer under the war-making power, can not affect the question, unless the treaty incorporates Cuba within the political limits of the United States. If, for the purpose of bringing the war to a conclusion, a treaty is made which requires us to occupy Cuba for a definite purpose and a limited time, the situation is not materially different from such occupation during the progress of the war; and while, therefore, Cuba is now undoubtedly subject to our jurisdiction, and while we are exercising all the rights of sovereignty in that island, both in civil and military affairs, yet Cuba has not become a part of the United States and can not, unless Congress should accept it as an integral part of the Union. Until such time, it may be land "appertaining

to the United States," an expression used by this court in *Jones* v. *United States* (137 U. S., 202), to describe the relation which our Government bears to certain guano islands in the Caribbean Sea.

This case throws a strong light upon the exact political status of Cuba, as well as upon our right to pass the act of June 6, 1900, and proceed thereunder. The plaintiff in error had been sentenced to death under an indictment which charged him with the murder of one Foster at the island of Navassa, "a place which then and there was under the sole and exclusive jurisdiction of the United States and out of the jurisdiction of any particular State or district of the United States * * * and which was then and there recognized and considered by the United States as appertaining to the United States, and which was also then and there in the possession of the United States under the laws of the United States then and there in force relating to such islands." The defendant was tried in the judicial district of Maryland under section 6 of the act of August 18, 1856 (11 Stat., 119), which provided that "all acts done and offenses or crimes committed on any such island, rock, or key, etc., shall be held and deemed to have been done and committed on the high seas, on board a merchant ship or vessel belonging to the United States, and be punished according to the laws of the United States relating to such ships or vessels and offenses on the high seas, which laws for the purposes aforesaid are hereby extended to and over such islands, rocks, or keys." Under section 1 of the said act it was provided that "When any citizen of the United States shall discover a deposit of guano on any island, rock, or

key not within the lawful jurisdiction of any government, and not occupied by the citizens of any other government, and shall take peaceable possession thereof and occupy the same, said island, rock, or key may, at the discretion of the President of the United States, be considered as appertaining to the United States."

It was contended by the plaintiff in error that the act, both with respect to the acquisition of the island as well as the section punishing offenses committed thereon, was unconstitutional for want of power. The Supreme Court negatived this contention, and in deciding the case approved the following propositions:

(1) By the law of nations, when citizens of one nation, with its authority and assent, take and hold actual, continuous, and useful possession of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired.

(2) Who is the sovereign *de jure* or *de facto* of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens, and subjects of that government.

(3) Courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence nor in accord with the pleadings.

(4) Congress may direct where and how a crime not committed within any State of the Union may be tried, and this legislation to punish in the nearest judicial district a crime committed at Navassa, in accordance with admiralty laws, was constitutional.

Applying the principle of this decision to the case at bar, it would seem that this court will not question the sovereignty which the Government, by reason of its treaty and supplementary legislation of Congress, is now exercising in Cuba, but will recognize it; and that, by reason of such sovereignty, Congress has full right, as in the Navassa case, to provide for the punishment of crimes committed in Cuba, and to provide the place and means for such punishment. (Constitution, Art. III, sec. 2.)

The United States thus acquired sovereignty in Cuba by its military occupation, and such right was affirmed and continued by a treaty by which Spain relinquished its claim of sovereignty and affirmed that of the United States.

XVII.

APPLICATION OF CONSTITUTIONAL GUARANTEES AS TO JURY TRIAL.

It is argued, however, that if Cuba is to be treated as domestic territory—as a part of the "outlying dominion of the United States," to use the expression of Chief Justice Waite—then, that the prohibitions of the bill of rights requiring an indictment of a grand jury and jury trial forbid Neely's removal to the courts of Cuba where the civil law is administered. But a reference to

the decisions of this court will show that these provisions, governing the procedure in criminal cases, do not apply to the territories of the United States, unless Congress expressly makes the Constitution applicable to such newly acquired territories.

While, in the case of *Callan* v. *Wilson* (127 U. S., 540), it was held that a man accused of a misdemeanor in the District of Columbia was entitled to trial by jury, this does not apply to the present case, because the District of Columbia was once a part of Maryland and therefore a part of the United States under the Constitution, and also because Congress expressly made the Constitution applicable to the State of Maryland. The two cases of *Webster* v. *Reid* (11 How., 437) and *Reynolds* v. *United States* (98 U. S., 145) are likewise inapplicable, because both cases arose in Territories, the first in Iowa and the second in Utah, to which Congress had expressly extended the Constitution, the first by the ordinance of 1787 and the second by the act of September 9, 1850. That this distinguishes these cases is shown by the later case of *American Publishing Company* v. *Fisher* (166 U. S., 464), in which this court held that a Territorial law of Utah authorizing a verdict when nine or more jurors concur, was invalid because Congress had extended the Constitution and laws to the Territory of Utah, and in this case Mr. Justice Brewer, in delivering the opinion of this court, distinguished the cases of *Webster* v. *Reid* and *Reynolds* v. *United States* on the lines indicated. On the contrary, the Supreme Court has repeatedly held that the States may do away with indictment by grand jury

and trial by petit jury in criminal cases, and that no fundamental rights under our Constitution or form of government are violated. (*Hurtado* v. *California*, 110 U. S., 516; *Maxwell* v. *Dow*, 176 U. S., 581.) *By what process of reasoning is the appellant entitled under the Constitution to a jury trial in Cuba, when he is not entitled to it in an existing State of the Union, if there abolished?* As was well argued by the present Solicitor-General in his address on the Constitution and the Territories, delivered at the annual meeting of the Pennsylvania Bar Association, on June 26, 1900:

> If the constitutional guarantees relating to indictment by a grand jury and trial by a petit jury are not fundamental in character, and therefore do not tie the hands of the inhabitants of a Territory when organizing a State, how can they tie the hands of the President and Congress in preserving order and protecting life and property in our new possessions?

The Solicitor-General continues his address with an argument upon this point which is stated with admirable clearness and convincing force:

> It is a strange contention that as soon as the treaty went into effect the power of the President and Congress to preserve order in the new possessions ceased. There were no grand juries, no petit juries, no machinery for punishing crime by the processes of the Anglo-Saxon law, and yet, if the limitations of the Constitution *ex proprio vigore* extended over these possessions, crime could be punished in no other way. The Constitution which gave the United States the power to acquire territory by treaty, and imposed upon Congress the duty of disposing of and governing it, did not leave the national government help-

less by demanding impossibilities. Until the progress of the people of these territories, their civilization and education, will permit of the organization of courts and juries after our system, these guaranties must be held inoperative, or the preservation of peace and order and the protection of life and property be abandoned.

The case of *In re Ross* (140 U. S., 453) clearly decides that the constitutional provisions as to jury trials have no application to cases arising outside of the accepted territorial limits of the Government, and therefore could have no application to Cuba, which, while subject to the jurisdiction of the United States, is not within its territorial limits. In that case Ross, who committed murder on board of an American ship in the harbor of Yokohama, was tried and sentenced to death by an American consular court in Japan. This consular court had been established by Congressional legislation made in execution of treaties, precisely as the present legislation is by virtue of the treaty-making power. The constitutionality of this legislation was affirmed, and although Ross had been convicted without previous presentment of a grand jury, or, indeed, a jury trial, yet the conviction was sustained.

> When, therefore, the representatives or officers of our Government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, can not invoke the protection of the provisions

> referred to until brought within the actual territorial boundaries of the United States. And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution. The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guarantees in the administration of the law upon criminals at home were to be transferred to such consular establishments, and applied before an American who had committed a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guarantees of the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture. (140 U. S., 464, 465.)

Applying this principle to the present case, it would seem clear that "the representatives or officers of our Government are permitted to exercise authority" in Cuba by reason of the treaty of Paris, whereby such right was conferred upon us. While Cuba is territory subject to our jurisdiction, it is not territory which has been ac-

3021

cepted or incorporated within the constitutional boundaries of the United States. The guarantees, therefore, of trial by jury have no application in such island.

In this connection the prophetic words of Mr. Justice Brown in the case of *Hodden* v. *Hardy* (169 U. S., 366) may be profitably recalled:

> In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system, which represented the growth of generations of inhabitants, a juri-prudence with which they had had no previous acquaintance or sympathy.

If these considerations are of potent force with respect to territories which have been permanently acquired by treaty or conquest, and which we propose to make an integral part of our national domain, *a fortiori* they apply to a peculiar and exceptional exigency such as our present relation to Cuba presents. If Cuba had been ceded by the treaty of Paris, as Porto Rico and the Philippines, the right of Congress to legislate for the removal of criminals to such islands could not be seriously disputed, and the folly of tearing up by the roots the methods of legal procedure which had existed there for centuries under the civil law would be equally apparent. This folly would be greater if, when our occupation

is temporary in its character, and its object is pacification, we, either, on the one hand, interfere with their methods of administering law, or, on the other hand, in defiance of the comity of nations and of the usages of the civilized world, make our nation an asylum for criminals fleeing from the outraged justice of such island.

XVIII.

EX PARTE MILLIGAN.

Counsel for appellant relies mainly upon the famous case of *Ex parte Milligan* (4 Wall., 2). But the two cases are widely dissimilar, and the Milligan case, while unquestionable law, does not rule this case. In this case Milligan, a citizen of the United States, and in no way connected with either the military or naval service of the United States, was arrested in the district of Indiana by a general of the Army, and tried and sentenced to death by a military commission. The court found that he was not a resident of the rebellious States and that the civil courts of the State of Indiana were then in session and were fully competent to try him for any act of treason against the United States. The court further found as the chief ground of its decision that, although the State of Indiana had been placed within the limits of a military district, and had been throughout the war threatened with a possible invasion, that this did not constitute Indiana "the theater of military operations." This court said in this connection (p. 126):

> If armies were collected in Indiana, they were to be employed in another locality, where the laws were

> obstructed and the national authority disputed. On *her* soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law can not arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.
>
> It is difficult to see how the *safety* of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them until the Government was prepared for their trial, when the courts were ready and open to try them.

As to the occasions when martial law can be properly applied, this court says (p. 127):

> If, in foreign invasion or civil war, the courts are actually closed and it is impossible to administer criminal justice according to law, *then*, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the Army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.

This case differs from the case at bar in the following essential respects:

(1) Milligan was not in any manner connected with the military service, while Neely, according to appellant's theory, although not a soldier, was yet connected with the postal service, which had been established by the military commander, and as such was justly subject to military, although not to martial, law.

(2) No condition of war existed in the State of Indiana, but in the present case there is constructively a condition

of affairs which, while they may not be styled a "state of war," yet require military rule. The conquering armies of the United States displaced the sovereign authority in Cuba; and until a new civil government is constituted by the people of Cuba, its occupation by the United States is essentially a military occupation, and as such, military law would apply.

(3) Milligan was sentenced by a court-martial, composed of army officers, whereas the Government seeks to subject Neely to a trial by the civil courts of Cuba. In this respect the two cases differ as day from night. This court reversed the sentence of death because Milligan was not tried by the civil courts which were then open, but by a military commission. In this case, in the spirit of this decision, the Government seeks to try Neely not by court-martial, but by the recognized criminal courts of Cuba which existed prior to the war and whose existence the war has not interrupted. We are therefore doing precisely that which this court said should be done in *Ex parte Milligan*.

The criminal courts of Cuba may exist by sufferance of the military commander, but this does not make them less civil, and not military courts.

The President stated the law of nations with regard to the state of a conquered country with accuracy in his communication of July 13, 1898, already quoted, when he said:

> Though the powers of the military occupant are absolute and supreme, and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect

30213

> private rights of person and of property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent, and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion.

In accordance with this Executive order, General Brooke, the military commander, on April 14, 1899, recognized the existing civil courts, including the court which subsequently indicted Neely for the embezzlement of the Cuban postal funds. As appears by the petition for the *habeas corpus*, the judges of these courts are native Cubans and administer the Spanish law as it was prior to the war. The judges are not, therefore, officers of the Army, and, while it is true that they exercise their functions by permission of the military governor, yet such is always the case when a country is conquered and the conditions do not require the suppression of its local tribunals, and it has never been contended that if a conquering invader permits the local courts to continue to administer justice that that consideration makes them military courts.

They do exist by virtue of military government, and by virtue of the law of nations, but, as has been pointed out by this court, military law must not be confounded with martial law. (See *Ex parte Milligan*, 71 U. S., 2.)

As, therefore, Neely, an employee of the military department of Cuba, is to be tried by the local courts of

Cuba, composed entirely of civilians, and administering, not martial law, but the law of Cuba as it existed prior to the Cuban war, it is manifest that the case does not fall within the ruling of *Ex parte Milligan*, where a civilian, disconnected with the military service, was tried, not by the civil courts or by the procedure of civil law, but by a court-martial, in accordance with martial law.

Judge Lacombe clearly expresses this in his opinion in the case at bar as follows:

> Reference is made to *Ex parte Milligan* (71 U. S., 2), but that case is not at all in point. There a citizen was tried by military commission, not in a foreign country but in the State of Indiana, a portion of the United States not at the time a part of the theater of war, with civil courts organized and in full operation having jurisdiction to hear and determine all questions as to the offense with which he was charged. But there is no suggestion here that if remanded to Cuba Neely will be tried by a court-martial or otherwise than by a civil court, following the same procedure as that prevailing before the concession of Cuba's independence. And, indeed, if the criminal laws of the island be enforced solely by courts-martial that circumstance would not be a sufficient answer to request for extradition; having chosen the country in which to commit the crime, he must accept the tribunals which administer its laws.

These conclusions, even as to Cuba, are fortified by judicial precedents, and, while the decision in question is not of binding authority on this court, yet it may be referred to for the force of its reasoning, and is therefore make a part of this argument.

We refer to the very recent case of the *State of Louisiana* v. *Wm. A. Cox*, in which Cox was arrested by the police authorities of New Orleans, charged with having committed grand larceny in the city of Habana, island of Cuba. He was detained pending proceedings by the Federal Government to remove him to Habana, and while in custody his discharge was sought upon the same ground as is now urged in behalf of the present appellant, namely, that the United States was without authority to remove him for trial to Cuba, because Cuba was not territory subject to our jurisdiction. The opinion, which is not, to counsel's knowledge, reported in any legal publication, is appended to this brief, and will be found, infra, page 104. In substance the learned judge concluded as follows:

> Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as a part of the domain of the conqueror so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark. It might, therefore, with certainty be said that the island of Cuba, after its capitulation, remained an island of the United States until restored to her people.
>
> The treaty of peace binds the United States to occupy the island and to discharge the obligations resulting from such occupancy for the protection of life and property. It is given to the Spaniards the right to appear before the courts and has subjected them in matters civil and criminal to the jurisdiction of the country wherein they reside, pursuant to the ordinary laws governing the same, and it will

after its occupancy advise any government to assume the same obligations. These obligations are sacred to an oppressed people, and the faith of the United States is pledged to their fulfillment. It would be indeed a strange anomaly if a citizen of the United States could with impunity rob and plunder the people of Cuba and receive justification at the hands of the courts within the United States under the plea that Cuba is not a part of the United States. This court can not from patriotic or political motives determine the matter.

The court concludes:

The court is of the opinion that the use of the word "territory" in the section of the Revised Statutes referred to herein, is intended to embrace any portion of land over which the United States exercises control, sovereignty, dominion, and occupation. These essentials are all found in the existing conditions, and Cuba is unquestionably a territory within the intention of our law.

XIX.

That such sovereignty is a political and not a judicial question, and its exercise by the political department of the Government conclusively binds the judges as well as all other officers, citizens, and subjects of that Government.

This proposition needs little argument. It is abundantly fortified by the paragraph already quoted from the decision of this court in *Jones* v. *United States* (137 U. S., 202, *supra*, p. 47). The appellant must either deny the power of the Government to make the treaty or he must assert that the judiciary can determine the political question whether the pacification of Cuba has been ac-

30215

complished. Either proposition is untenable and can not be supported either by principle or authority. On the one hand, the right of the Government to agree by treaty with another power, with which it has been at war, to continue military occupation until peace and order are restored, can not be seriously questioned. Indeed, it could be urged that, apart from any treaty, it was the duty of the United States, after it chose to intervene between Cuba and Spain and make the quarrel of Cuba her own, to restore law and order in that unhappy island. The original occupation of Cuba, therefore, after the treaty had been ratified, was a lawful exercise of the treaty-making power, and the appellant, in denying the lawfulness of the occupation, is driven to the last resource of asserting, and asking this court to say, that there is no further necessity for such occupation. Such question can not be decided by the courts. It is a question for the political department of the Government. To decide it rightly requires an intimate knowledge of the present state of Cuba and of the efforts that are being made to construct a new government over the ruins of the old. Whether Cuba is pacified and whether the government now in process of formation is calculated to give a stable government are questions which concern the Commander in Chief of our Armies and our statesmen in Congress. This court is without the means or the power to decide it. To attempt to do so would be to usurp the prerogatives of the President as well as those of Congress.

This court is equally without power to impute to the President a desire to break a solemn pledge of the nation and to rule Cuba with the arbitrary power of a despot.

As was said by the great Chief Justice in *Foster* v. *Neilson*, (2 Pet., 253, 309):

> If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interest against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession and which it claims under a treaty; *if the legislature has acted on the construction thus asserted*, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of a nation is, as has been truly said, more a political than a legal question, and in its discussion the courts of every country must respect *the pronounced will of the legislature*.

XX.

CONCLUSION.

It may not be amiss, in conclusion, to test the soundness of appellant's contention by a consideration of its inevitable consequences. The appellant asks this court in effect to direct the immediate withdrawal from Cuba both of the army and civil officers. At present there is no government to replace our Government, and such a sudden and summary abandonment of our occupation might easily result in a state of anarchy, in which life and property would be sacrificed. If an attempt were made by any foreign nation to hold this country responsible for such destruction, on the ground that we had assumed by direct treaty stipulation to protect life and property in Cuba, could the United States take a more humiliating position than to defend its abandonment of a sacred trust

30216

on the ground that the Supreme Court had declared it wanting in authority to fulfill such treaty stipulations? In doing so, would we not be wanting in that "decent respect to the opinions of mankind" of which Jefferson wrote in the Preamble of the great Declaration?

To regenerate Cuba, to bring order out of chaos, to build a new and stable government on the ruins of the old, is not an easy task. Rome was not built in a day, and the creation of a responsible and independent Cuban government must necessarily require time, patience, and judgment. To discharge this momentous duty the widest discretion must be reposed in the political department of the Government. The functions of this court are not political, and it may well refuse to interfere with such discretion. It will assume that both the President and Congress are acting in the utmost good faith. The policy of the executive department of the Government is thus authoritatively stated by the President in his message of December 5, 1899:

> This nation has assumed before the world a grave responsibility for the future good government of Cuba. We have accepted a trust the fulfillment of which calls for the sternest integrity of purpose and the exercise of the highest wisdom. The new Cuba yet to arise from the ashes of the past must needs be bound to us by ties of singular intimacy and strength if its enduring welfare is to be assured. Whether those ties shall be organic or conventional, the destinies of Cuba are in some rightful form and manner irrevocably linked with our own, but how, and how far, is for the future to determine in the ripeness of events. Whatever be the outcome, we must

see to it that free Cuba be a reality, not a name, a perfect entity, not a hasty experiment bearing within itself the elements of failure.

Respectfully submitted.

JAMES M. BECK,
Assistant Attorney-General.

30217

APPENDIX.

I.

JUDGE LACOMBE'S OPINION.

United States circuit court, southern district of New York.

In the matter of the application for extradition of Charles F. W. Neely.

LACOMBE, Circuit Judge.

Argument was heard on the preliminary objections on June 29, and the 23d of July was then designated for the presentation of testimony on the question of probable cause, in the event of the court's overruling such objections. That date is so near at hand that decision on the objections should be filed forthwith. Counsel have taken so long to prepare briefs—they were only received yesterday—that there is not the time to enter into any elaborate discussion of the points presented; nor indeed is any such discussion necessary. Some of the objections advanced on the oral argument appear not now to be pressed, and those still urged do not present any difficult questions.

This proceeding is brought under a recent amendment to section 5270 of the United States Revised Statutes, hereinafter referred to as the act of June 6, 1900. To

the existing provisions as to extradition it adds the following:

> Whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein, by the commission of the following offenses, namely: * * * (Here follows a long enumeration which includes, "embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries") * * * and who shall depart or flee, or who has departed or fled, from justice therein to the United States, any Territory thereof or to the District of Columbia, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title, so far as applicable, shall govern proceedings authorized by this proviso: *Provided further*, That such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged: *And provided further*, That no return or surrender shall be made of any person charged with the commission of any offense of a political nature. If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order

of the Secretary of State of the United States, and such authorities shall secure to such a person a fair and impartial trial.

Under the exercise of the treaty-making power Congress has the right to provide for the return of a fugitive criminal to the foreign country from which he has fled; and, waiving any requirement of entire reciprocity from the foreign country, it may by statute, without treaty, provide for such return. This power has been exercised by the Federal Government for years without question. It is a power exercised by every sovereign State, sometimes in accordance with the provisions of a treaty, sometimes without any treaty, as a matter of international comity. The mere fact that the individual who has committed a crime in a foreign country is himself a citizen of the United States does not prevent the United States from returning him to the country against whose laws he has offended. Having voluntarily gone into the foreign country to commit his crime, he may involuntarily be returned there for trial and punishment. Nor is it any sound objection against the extradition of the criminal citizen that the courts in the country to which he is returned follow a procedure different from our own. The provisions of articles 4 and 5 of the amendments to the Constitution have no relation to the subject of extradition. (*In re Giacomo*, 12 Blatchf. C. C., 391.) He may be returned to some Latin country where conviction might follow upon hearsay testimony, or even upon vociferous declarations of belief by more or less credulous individuals; if Congress chooses to make such a treaty he may be sent to Turkey or Siam or Zanzibar, where it is safe to assume the procedure bears still less likeness to the common law. Having himself selected the forum for the commission of his crime, he will not be heard to object that the procedure of its courts is not quite what he would prefer when he comes

to stand trial. Any other rule would make this country an inviolable asylum for its citizens whenever they may return to it red handed from crimes committed abroad, for its courts can not punish for a crime committed in a foreign country.

These propositions are elementary, and nothing in the brief or in the oral argument challenges their accuracy. The principal objection advanced on behalf of the prisoner, whose identity is not disputed, is that this particular act of June 6, 1900, is unconstitutional, because it provides for extradition to a foreign country occupied by or under the control of the United States, or possibly, to state the argument more accurately, because under the Constitution the United States can not occupy or exercise control over the island of Cuba, since its inhabitants are free and independent.

The joint resolution of April 19, 1898, declared that "the people of the island of Cuba are, and of right ought to be, free and independent," and this finding as to their status may be accepted by the courts. Nevertheless, it is an historical fact of which the courts will take judicial notice that on that same day the territory of that island was occupied by Spain. Against that power we declared war. We sent our fleets and armies to the island, invaded it, joined battle with our alien enemies therein, and continued the struggle with them until throughout the length and breadth of the island our forces were in full military occupation of this foreign territory. The declaration of war was in no wise obnoxious to the Constitution, nor was the invasion, nor the conflict, nor the result. In the entire sequence of events down to the date of Spain's acquiescence in such result by the ratification of the treaty of Paris, counsel for the prisoner finds nothing to criticise as obnoxious to the Federal Constitution. On the day that treaty was signed we were indisputably in military occu-

30219

pation of the island. Why, under the Constitution that occupation, legitimately entered upon, may not continue to secure the lives and property of American citizens within that territory until the political branch of the Government shall be satisfied that its further continuance is unnecessary, it is difficult to conceive, and no authority cited in the brief sustains any such proposition. Reference is made to *Ex parte Milligan* (71 U. S., 2), but that case is not at all in point. There a citizen was tried by military commission, not in a foreign country, but in the State of Indiana, a portion of the United States, not at the time a part of the theater of war, with civil courts organized and in full operation, having jurisdiction to hear and determine all questions as to the offense with which he was charged. But there is no suggestion here that if remanded to Cuba Neely will be tried by a court-martial or otherwise than by a civil court, following the same procedure as that prevailing before the concession of Cuba's independence. And, indeed, if the criminal laws of the island be enforced solely by courts-martial, that circumstance would not be a sufficient answer to request for extradition; having chosen the country in which to commit the crime, he must accept the tribunals which administer its laws. Moreover, it will be noted that the act of June 6, 1900, is most careful to safeguard the party accused against unsubstantial charges of crime. It provides that before the accused is returned there shall be an inquiry before a judge of a Federal court "who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged;" if the evidence fails to establish probable cause the accused shall not be returned. This means probable cause tested by the practice of our courts, and supported by *evidence* which we would hold competent. No mere statement of an official that he has caused an examination into the facts to be made with such and

such a result is of any probative weight; nor is hearsay competent nor unverified copies of documents. There must be laid before the court sworn statements as to facts (not as to beliefs or opinions or deductions) from which the judge may reach the conclusion, despite such explanatory evidence as the accused may offer, that there is a prima facie case made out against him.

The objection that the act of June 6, 1900, is unconstitutional is unsound.

Various technical objections are urged to the sufficiency—in form—of the various documents presented, as, for instance, that a certain certificate is signed by the military governor, and not by the principal diplomatic or consular officer. And that there is no certification that certain depositions are so authenticated "as to entitle them to be received for similar purposes by the tribunals of the foreign country"—probably not material when authenticated so as to be received upon the special independent investigation to be had here under the act of 1900.

Objections of this class are not given the weight once accorded to them when the granting of a request for extradition was more jealously regarded by the courts than it is to-day. Originally it seemed to be the theory that the sole foundation of the practice rested in reciprocity; and that if some particular foreign country were backward about returning our criminals we would be keen to keep theirs. During this period courts were astute to find flaws in certificates, jurats, seals, and signatures as an excuse for refusing the request of some demanding government. At last, however, it seems to have been discovered that the thief, the ruffian, and the forger was not a particularly valuable acquisition; and that although it might be highly desirable that offenders against our laws should be brought back here and tried as a deterrent example, it was possibly more important

that this country should not be made a city of refuge for foreign criminals, and that an enlightened public policy would be astute to return them, once we were satisfied that they were criminals. The expression of this public policy is found in the provisions of the act of Congress which excludes convicted criminals whose offenses are not political, with those afflicted with contagious diseases, and such as are liable to become a public charge. Since then there has not been so much hypercriticism in dealing with objections as to form, and if the certificates, signatures, et cetera, are in substantial conformity to the requirements of the statute and give reasonable assurance of authenticity it is sufficient. Such seems to be the case here and the documents are admitted for what they may be worth. Some of them are mere declarations of opinion, containing no relevant facts; their effect, however, will not now be discussed.

Upon the oral argument some question was made as to whether article 401 of the Penal Code of Cuba and Porto Rico, or sections 37 and 55 of the Postal Code were in force in Cuba at the time of Neely's alleged offense. It is assumed from the circumstance that this point is not discussed in the briefs that counsel acquiesce in the suggestion made by the court upon the argument that the question now to be determined is whether there is probable cause that the prisoner committed the offense enumerated in the act of June 6, 1900. If that be shown, it may be left to the trial court to decide which specific provision of these codes was in force and violated. The description of offense in either code is clearly within the broad language of the act of June 6, 1900.

Counsel have discussed the evidence; this is premature, and will not be considered by the court until after the hearing on July 23, when further proofs may be adduced. It will be sufficient now to indicate that the mere presentation of an indictment or its equivalent can

not be held sufficient under this act. The court is to find probable cause *on evidence;* witnesses need not be brought from Cuba to testify here, but their sworn statements can certainly be obtained so that the court's conclusion may be based upon competent proof of facts within the knowledge of the witnesses.

The preliminary objections are overruled. The hearing on July 23 is fixed for 1.30 p. m.

July 18, 1900.

Henry L. Burnett, United States attorney, for the United States.

John D. Lindsay, for the accused.

II.

OPINION OF JUDGE DUGGAN OF LOUISIANA.

STATE OF LOUISIANA *v.* WILLIAM A. COX. } No. 925. First City Criminal Court.

Charge: "Being a fugitive from justice."

William A. Cox, the accused herein, is detained under a capias of this court, issued upon the affidavit of R. B. Stubbs, a member of the police department of this city, charging the said Cox with having committed the crime of grand larceny in the city of Habana, isle of Cuba, and being a fugitive from justice, all in violation of section 1038 of the Revised Statutes of this State. Counsel for the accused filed in this court a plea demurring to its jurisdiction and setting forth the grounds specifically, to wit:

(1) "That he is held under section 1038 of the Revised Statutes of this State, which statute only authorizes the detention of fugitives from a State or Territory of this Union.

(2) "That the affidavit made in pursuance of this statute alleges that he, the said W. A. Cox, committed the crime of grand larceny in the island of Cuba, which aforesaid island of Cuba is not, and never has been, either a State or Territory of the United States.

(3) "That there exists no treaty between the United States and the island of Cuba, and there can be no extraditable offense without a treaty.

(4) "That this honorable court, the courts of this or of the United States, possess no extraterritorial jurisdiction.

(5) "That no executive officer of this State or of the the United States possesses any power, discretional or otherwise, to deliver fugitives from foreign nations without a treaty."

(1) Section 1038 of the Revised Statutes of this State reads as follows:

> When any person shall be charged on oath of any creditable person, before any judge or justice of the peace of this State, with having committed any crime within any State or Territory of the United States, and has fled from justice, it shall be the duty of such judge or justice to issue his warrant for the arrest of such accused, and to proceed to the examination of such case and commit or discharge the accused, as such judge or justice may determine, provided no person so accused shall be detained in custody exceeding ninety days.

Counsel is in error in quoting the article to read "from a State or Territory of this Union," when, in fact, it should read "within any State or Territory of the United States." The difference is apparent, and stress is laid by counsel on the fact that Cuba is without the territorial limits of the United States. It is not at all necessary that before the sovereignty of the United States can be exercised the territory must be embraced in this Union.

During the war between the United States and Mexico the port of Tampico, in the Mexican State of Tamaulipas, was conquered, and possession of it held by the military authorities of the United States, acting under orders of the President. The port of Tampico * * * and the Mexican State of Tamaulipas, in which it is situated, were undoubtedly at the time * * * subject to the sovereignty and dominion of the United States. It did not thereby become a part of the Union. The boundaries of the United States were not extended by the conquest. (*Fleming et al.* v. *Page*, 9th Howard (U. S.), p. 603.)

A territory is defined by Bouvier as "a part of the country separate from the rest and subject to a particular jurisdiction. In the sense it is used in the Constitution of the United States it signifies a portion of the country, subject to and belonging to the United States, which is not within the boundary of the United States."

Another well-known authority defines it to be "A portion of land over which a country exercises sovereignty and dominion."

(2) Is the island of Cuba a territory within the meaning of the article 1038 of the Revised Statutes of this State?

Previous to the declaration of war between the United States and Spain the island of Cuba belonged to and was under the sovereignty of Spain. The United States, shortly after the opening of hostilities, landed troops in said island of Cuba, and as a result of the memorable charge at San Juan the Spanish surrendered and the military authorities of the United States were left in undisputed possession.

On December 10, 1898, commissioners appointed by the United States and Spain entered into a treaty of

30222

peace, which was ratified by the Senate of the United States on January 5, 1899. Article 1 of the said treaty reads as follows:

> Spain relinquishes all claim of sovereignty over and title to Cuba. And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may, under international law, result from the fact of its occupation, for the protection of life and property.

Article 11 of the said treaty of peace recites:

> The Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignty shall be subject, in matters civil as well as criminal, to the jurisd[illegible] of the country wherein they reside, pursuant to the [illegible]linary laws governing the same; and they shall have the right to appear before such courts and to pursue the same course as citizens of the country to which the courts belong.

Article 16 of the said treaty recites:

> It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof, but it will, upon the termination of such occupancy, advise any government established in the island to assume the same obligations.

The isle of Cuba is at the present time in actual possession of the authorities of the United States; the agents of the United States are governing its affairs and collecting and disbursing its public moneys, appointing and removing the judges of its courts, and, in fine, is exercising the prerogatives and control over the isle of Cuba

in the same degree as that exercised by it over territories within its boundaries. Its public officials, including the judiciary, have taken the oath of allegiance and obedience to the sovereignty of the United States, and the flag of the United States proclaims to the world its sovereignty and dominion. The machinery of the various departments of the civil government is in operation, and a military governor is exercising the duties of his office. A somewhat similar condition of affairs occurred at the time of the occupation of Tampico, Mexico, by the military forces of the United States. Justice was administered by courts appointed under the military authority, General Kearny, commanding the expedition to New Mexico and California, was instructed by the Secretary of War "to observe the same course of conduct in the departments that might be conquered by him, provide for the establishment of temporary civil governments, recommend the employment of such of the existing civil officers as were known to be friendly to the United States and would take the oath of allegiance to them," and authorized him to "assure the people of these provinces of the wish and design of the United States to provide for them a free government with the least possible delay, similar to that which exists in our Territories."

Hon. James Buchanan, Secretary of State, in a dispatch to Mr. Voorhees on October 7, 1848, writing on the conditions then existing in California, said:

> The President in his annual message, at the commencement of the next session, will recommend all these measures to Congress in the strongest terms, and will use every effort, consistent with his duty, to insure their accomplishment. In the meantime the condition of the people of California is anomalous, and will require, on their part, the exercise of great prudence and discretion. By the conclusion of the treaty of peace the military government

30223

which was established over them under the laws of war, as recognized by the practice of all civilized nations, has ceased to derive its authority from its source of power. But is there, for this reason, no government in California? Are life, liberty, and property under the protection of no existing authorities? This would be a singular phenomenon in the face of the world, and especially among American citizens, distinguished as they are above all other people for their law-abiding character. Fortunately they are not reduced to this sad condition. The termination of the war left an existing government, a government de facto, in full operation, and this will continue, with the presumed consent of the people, until Congress shall provide for them a territorial government. The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the domain of the strongest.

Referring to the above, the Supreme Court of the United States, in *Cross et als.* v. *Harrison* (16 Howard, U. S., p. 190), said:

> No one can doubt that these orders of the President and the action of our army and navy commander in California in conformity with them was according to the laws of arms and the right of conquest, or that they were operative until ratification and exchange of a treaty of peace. Such would be the case upon general principles in respect to war and peace between nations. In this instance it is recognized by the treaty itself.

It has been stated that we are not informed that the laws of Cuba provide a penalty against grand larceny. This court can take judicial notice of the fact that there was in the laws of Cuba, under the sovereignty of Spain, a statute denouncing the crime of grand larceny and prescribing its penalty—articles 384–502 and article 589 of the law of criminal procedure. The same articles are in full force and effect at the present time. "The laws and government in force at the time of conquest remain in force until altered by the conqueror." (*Hawkins* v. *Filkins*, art. 24, p. 286.) "All the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in full force until altered by the Government of the United States." *American Insurance Co. et al.* v. *Canter*, 1 Peters (U. S.), 511.)

> During the civil war, when any portion of the Southern States was in the occupation of the forces of the United States, the municipal laws, if not suspended or superseded, were generally administered there by the ordinary tribunals for the protection and benefit of persons not in the military service. (*Dow* v. *Johnson*, 100 U. S., p. 158.)

In re Thirty Hogsheads of Sugar v. *Boyle et als.* (9 Cranch U. S., 191), the court said: "The possession of the soil impresses upon the owner the character of the country." Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of

Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark. It might, therefore with certainty be said that the island of Cuba, after its capitulation, remained an island of the United States, until restored to her people.

The treaty of peace binds the United States to occupy the island, and to discharge the obligations resulting from such occupancy, for the protection of life and property. It is given to the Spaniards the right to appear before the courts and has subjected them in matters civil and criminal to the jurisdiction of the country wherein they reside, pursuant to the ordinary laws governing the same, and it will, after its occupancy, advise any government to assume the same obligations. These obligations are sacred to an oppressed people, and the faith of the United States is pledged to their fulfillment. It would be indeed a strange anomaly if a citizen of the United States could with impunity rob and plunder the people of Cuba and receive justification at the hands of the courts within the United States, under the plea that Cuba is not a part of the United States. This court can not from patriotic or political motives determine the matter. If the laws of this State were not framed to meet the exigencies of a case like the present one the fault could only be attributable to Congress, which in its anxiety and eagerness to inject foreign complications and situations into our present form of government, has negligently forgotten to provide the means of enforcing obligations assumed by it to the people of the island of Cuba.

The court is of the opinion that the use of the word "territory" in the section of the Revised Statutes referred to herein is intended to embrace any portion of land over which the United States exercises control, sovereignty, dominion, and occupation. These essentials are all found in the existing conditions, and Cuba is unquestionably a Territory within the intention of our law.

(3) (4) (5). The court will not pass upon these objections for the reason that the subject-matter does not come within its jurisdiction. It is, therefore, ordered that the demurrer herein filed be overruled; and it is further ordered that the accused stand committed.

(Signed) T. J. DUGGAN,
Judge First City Criminal Court.

I hereby certify that the above is a correct copy of the original decision handed down in open court on Saturday, September 9, 1899, by the Hon. T. J. Duggan, judge, in the above numbered and entitled cause.

CHAS. F. BYRNE,
Stenographer and Deputy Clerk.

NEW ORLEANS, La., *March 28, 1900.*

III.

THE ARGUELLES CASE.

The facts in this case were that on April 5, 1864, the minister of Spain addressed a note to the Secretary of State, informing him that one Jose Arguelles had escaped from the island of Cuba under the charge of having sold into slavery a large number of recaptured African slaves, and had taken refuge in New York. The minister therefore asked that Arguelles might be delivered up to the Government of Spain, "not upon the ground of a right to demand it, but as an act of comity in the interest of justice and humanity." (Letter of Secretary Seward to chairman of the Committee on the Judiciary, House of Representatives, Diplomatic Correspondence, 1864, part 4, p. 37.) By direction of the President, Arguelles was seized in New York and delivered to the Spanish authorities for trial in Habana. When this became known a

30225

resolution was introduced in the House of Representatives, condemning the action of the Executive. Mr. Seward defended his course in a lengthy and forcible communication addressed to the chairman of the Committee on the Judiciary, to which reference will presently be made. Once again the legislative branch of the Government affirmed the present contention of the Government, for as in the case of Robbins, when the House, by a large majority, accepted the view of Marshall as to President Adams's power, so in the Arguelles case the House accepted the contention of Secretary Seward and defeated the resolution of censure. In the Senate a resolution was adopted requesting information, and on June 1, 1864, President Lincoln transmitted to the Senate Secretary Seward's report, which said:

> There being no treaty of extradition between the United States and Spain, nor any act of Congress directing how fugitives from justice in Spanish dominions shall be delivered up, the extradition in the case referred to in the resolution of the Senate is understood by this Department to have been made in virtue of the law of nations and the Constitution of the United States. Although there is a conflict of authorities concerning the expediency of exercising comity toward a foreign government by surrendering, at its request, one of its own subjects charged with the commission of crime within its territory, and although it may be conceded that there is no national obligation to make such a surrender on a demand therefor, unless it is acknowledged by treaty or by statute law, yet a nation is never bound to furnish asylum to dangerous criminals who are offenders against the human race; and it is believed that if, in any case, the comity could with propriety be practiced, the one which is understood to have

called forth the resolution furnished a just occasion for its exercise.

Secretary Seward's communication to the House of Representatives constitutes a powerful argument for the power of the Executive to extradite in the absence of either treaty or Congressional enactment. It is as strong in reason as it is eloquent in diction. It bears with striking force upon the present contention, for, if the executive department of the Government may extradite as an act of sovereign power, independent of treaty or statutory enactment, *a fortiori* it can extradite when authorized, empowered, and directed by Congress so to do.

Mr. Seward reviews the opinions of learned writers on international law and the decisions of the courts, to which reference has already been made in this brief. He concludes that "upon the plainest reason and a uniform concurrence of authority, that the United States, in its relations to foreign nations, certainly possesses the authority to surrender to the pursuing justice of a foreign state a fugitive criminal found within our territory."

As to the alleged right of asylum in this country in the absence of treaty regulations for extradition, Mr. Seward's reasoning is especially forcible. He says:

> That the practice of civilized nations, and especially of this country, has maintained this privilege of asylum, and that this nation at least would consider its honor engaged to vindicate it, no one will be disposed to deny. This privilege is understood to embrace refugees from personal oppression and from the consequences of political offenses. But no civilized nation, and our own as little as any, has included within this privilege criminals guilty of crimes proscribed by nature and humanity. In these cases, to afford protection against pursuing justice is an offense against humanity and against our own society. Mr. Wirt, in a passage already quoted,

> draws the distinction with force and precision. In speaking of the case of the criminals before him, he says their surrender "would violate no claim which these fugitives have on us. Humanity requires us to afford an asylum to the unfortunate, but not to furnish a place of refuge to the guilty. On the other hand, respect for ourselves and a prudent regard for the purity of our society admonish us to repel rather than invite the admixture of foreign turpitude and contamination."

Mr. Seward concludes his forcible vindication of his position by saying:

> Upon these considerations, then, it would seem that the action of the President of the United States, in directing the extradition of Arguelles upon the application of the Government of Spain, was in pursuance of a national authority, sanctioned by the law of nations; was in exercise of an executive function belonging to his office under the Constitution; was not in derogation of any right of asylum; was a just recognition of our relations with a friendly power; was conformed to the cherished policy of this country for the extinction of the traffic in slaves, and was an obligation to justice and humanity which could not have been withheld.

All of which might with almost equal propriety be applied to the case at bar.

IV.

THE CUBAN CRIMINAL CODE.

In order that there may be no misapprehension by the court as to the nature of the criminal tribunals now sitting in Cuba and the methods employed therein, it may

be well to ascertain from authoritative sources the exact nature of these tribunals.

Dr. Walton, whose work on The Civil Law in Spain and Spanish America is an authority, and who has exceptional capacity to treat the subject, thus describes the Spanish criminal code as it existed prior to the occupation by the United States:

> The assertions often made by ignorant people that under the old Spanish or Roman system the proceedings are secret, and that the accused does not know who are his accusers or what the witnesses have testified against him, is incorrect, misleading, and one which has caused Spanish-American countries much trouble when United States citizens have been concerned.
>
> Little difficulty is caused by the minor offenses or misdemeanors which are tried before the lowest courts held by municipal judges and from which appeals lie to the higher courts, in a manner similar to the common-law system, hence such cases may be eliminated.
>
> In the more serious criminal offenses every criminal trial is divided into two stages—the summary or preliminary investigation (*sumario*), carried on under the old Spanish system, usually by a judge of the first instance, a *fiscal* or public attorney, and an *escribano* or clerk, who immediately repair to the spot of the crime and begin a thorough *ex parte* investigation. The testimony of the accused is often taken down without his knowing with what crime he is charged or who the witnesses against him are; and during this stage the accused is kept in solitary confinement so that he can not connive any scheme which might defeat the ends of justice, and while in such confinement he is called *incommunicado*.[1]

[1] Abolished since our occupation.

Under the Spanish constitution (see articles 4 and 5) a person can not be detained but for just cause, and solitary confinement is limited. These provisions can be exercised similarly to a writ of *habeas corpus*.

The summary or preliminary proceedings correspond to the secret investigation of a grand jury in the United States who listen to such testimony as is offered or is deemed sufficient without permitting the accused to be present or to know what transpires, and, if, in their judgment, there is sufficient ground, an indictment is found, and thereafter a trial begins in public court.

This is not unlike the civil-law system in which the judge of the first instance, the public attorney, and clerk constitute a grand jury, and if there is no case made out the prisoner is given his liberty; should a *prima facie* showing be made against the accused he is released from solitary and committed to ordinary confinement.

The trial does not take place before the judge who has conducted the investigation (as is often erroneously stated), but this judge refers the whole record of proceedings to the criminal branch of the next higher court or *audiencia* for a public trial, where the prisoner is faced with his accuser and witnesses and is provided with a competent attorney to defend him.

In the Spanish-American countries testimony is taken down in writing, and, after being read to the witness, is signed by him and by the judge, in order to prove that his statements have been correctly recorded.

This gives a degree of certainty to the correctness of the testimony which can not be obtained by a stenographic report, and it renders it impossible for

the judge or opposing counsel to record language different from that actually used.

When the summary is ended all the testimony is presented to the accused for his examination, and the right is then given him to cross-examine the witnesses who have appeared against him.

The cross-examination is an old Spanish proceeding, called *careo*, which means that the accused is personally confronted with the witnesses in presence of the judge, for the purpose of cross-examining them. It is, therefore, quite incorrect to assert that because the *sumario*, or first stage under the Latin system, is kept secret, the accused does not know anything regarding the evidence against him; the fact being that during the second or plenary stage of the proceeding he is fully informed of all that has been done and is given an opportunity to refute it, either by presenting his own witnesses or by cross-examining such as have been presented by the other side or have been called by the judge.

It should not be difficult to see which system of criminal jurisprudence is best calculated to do justice by ascertaining the real facts of the case, whether by a judge of long experience and proficiency in his profession and with no personal interest in the case tried before him, or by a jury composed of men who have had no experience in criminal jurisprudence. If the judge may sometimes be derelict in his duties, so may the jury sometimes be controlled by their emotions or prejudices. If the judge fails to do justice, his failure may be corrected by an appellate court, as all cases must be reviewed upon appeal.

The common-law criminal jurisprudence is founded upon the principle that it is better to let one hundred criminals go unpunished than to inflict punishment upon one innocent person. While the

> Spanish system accepts that humanitarian principle, it is nevertheless better calculated to prevent the escape of a criminal unpunished.

When the United States took possession of Cuba its first work was to reconstruct both the personnel and methods of the civil and criminal courts of that island. Counsel for the appellant has had much to say with reference to the abuses in the Spanish judicial system which prevailed prior to the war of liberation, but he has neglected to inform the court that all of these abuses have been swept away and that the civil procedure has been reformed so that it may challenge favorable comparison with our own.

In his first order, dated January 1, 1899, the military governor of Cuba provided that—

> The civil and criminal code which prevailed prior to the relinquishment of Spanish sovereignty will remain in force, with such modifications and changes as may from time to time be found necessary in the interest of good government.

On January 12, 1899, the military governor created a "department of justice and public instruction," and appointed a learned Cuban, one José Antonio Gonzalez Lanuza, to be its secretary.

As the treaty of Paris had severed the connection between the local courts of Cuba and the appellate court in Spain, the military governor, on April 14, 1899, constituted a supreme court, composed of Cuban lawyers and vested with full appellate jurisdiction. (See Order 41, Civil Report of Major-General Brooke, p. 34.)

By order dated June 15, 1899, the criminal courts, namely, the audiencias, were organized. The full order constituting them will be found in Brooke's Civil Report, page 49. The material portions of the order are as follows:

I. Hereafter the audiencias of the island shall be

organized and shall exercise jurisdiction in accordance with the provisions of the present order.

II. There shall be six audiencias in the island, viz, Pinar del Rio, Habana, Matanzas, Santa Clara, Puerto Principe, and Santiago de Cuba. Each of these audiencias shall exercise civil and criminal jurisdiction within the limits of the above-mentioned provinces, respectively. The jurisdiction of the audiencia of Habana shall extend also to administrative matters (contencioso administrativo).

The chief defects in the criminal code of Cuba as it had existed prior to the war were, in the first place, the incomunicación, whereby on arrest a man was confined and restrained from communication with his friends until a preliminary investigation was made as to his guilt; second, the payment of judges by fees, which was an invitation to corruption; and, third, the personnel of the courts as they then existed. These and other abuses were at once remedied by order 109, dated July 13, 1899. (See Brooke's Civil Report, p. 71.) Cuban lawyers of approved learning and integrity were selected and appointed as judges of these courts. They were compensated by fixed salaries and all fees were abolished, and the method of arresting, arraigning, indicting, and trying a man was changed so that it would conform to Anglo-Saxon ideas. Thus the incomunicación was abolished, and a defendant was given the right upon arrest to be brought before the committing magistrate to be informed of what he was accused, and by whom, and given reasonable time and opportunity to select an attorney to defend him. Moreover, the right previously existing to compel a defendant to testify against himself was abolished, and, in accordance with our methods, it was made optional with him either to testify or be silent. The publicity of all criminal proceedings was likewise insured, the right of appeal provided to an appellate court in case of error, and a right

to release on bail was also provided. This order reconstructing the Cuban criminal code is too long to be stated at length, but will be found in Brooke's Civil Report, pages 71, 72, 73, and 74.

It is impossible to describe at length or with any completeness the present constitution of these courts and the methods of legal procedure. All of the judges are Cuban lawyers and civilians, and none of them are officers of the United States Army. Their names will be found in the various orders appointing them. (Brooke's Civil Report, pp. 104–126.)

The court which preliminarily investigated the charges against Neely is called the court of the first instance, and is analogous to our grand jury. It has already indicted Neely. The court which will try Neely, if he be extradited, is the so-called "audiencia de lo criminal," a court of record, possessing full jurisdiction of criminal offenses. (See appellant's brief, pp. 76 and 77.)

From the audiencia an appeal lies to the supreme court of Cuba.

The abuses which existed prior to the occupation of Cuba by the United States must not be confused with the present condition of affairs with respect to the administration of justice. There is no testimony before this court which would justify it in assuming that if Neely be extradited he will not secure a fair trial in Cuba. The suggestion that he will not is wholly an assumption of appellant's counsel and is based upon what *was* rather than what *is*. In any event, the question as to whether extradition should be made in view of the present judicial system of Cuba is a question for the executive branch of the Government. If, after Neely is finally held for extradition, the President is satisfied that he could not receive a fair trial, it is to be presumed that the extradition would not be authorized by the Executive. Moreover, if Neely be extradited and should not receive a fair trial by the local

civil tribunals of Cuba, it is within the power of the United States to annul any decision of the local courts which shall do Neely an injustice. This court need only recognize the existence of civil courts in Cuba, and assume in this, as in any other extradition case, that the civil courts of the demanding country will do justice.

V.

THE PRESIDENT'S MESSAGE OF DECEMBER 3, 1900.

The following may be quoted from the President's message of December 3, 1900, as showing that the Executive has not recognized any Cuban *government* as now in existence:

> On the 25th of July, 1900, I directed that a call be issued for an election in Cuba for members of a constitutional convention to frame a constitution as a basis for a stable and independent government in the island. In pursuance thereof the military governor issued the following instructions:
>
> Whereas the Congress of the United States, by its joint resolution of April 20, 1898, declared—
>
> "That the people of the island of Cuba are, and of right ought to be, free and independent.
>
> "That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island, except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people."
>
> And whereas the people of Cuba have established municipal governments, deriving their authority from the suffrages of the people given under just

and equal laws, and are now ready, in like manner, to proceed to the establishment of a general government which shall assume and exercise sovereignty, jurisdiction, and control over the island:

Therefore, it is ordered that a general election be held in the island of Cuba on the third Saturday of September, in the year nineteen hundred, to elect delegates to a convention to meet in the city of Habana at twelve o'clock noon on the first Monday of November, in the year nineteen hundred, to frame and adopt a constitution for the people of Cuba, and as a part thereof to provide for and agree with the Government of the United States upon the relations to exist between that Government and the government of Cuba, and to provide for the election by the people of officers under such constitution, and the transfer of government to the officers so elected.

The election will be held in the several voting precincts of the island, under and pursuant to the provisions of the electoral law of April 18, 1900, and the amendments thereof.

The election was held on the 15th of September, and the convention assembled on the 5th of November, 1900, and is now in session.

After describing the proceedings at the opening of this constitutional convention, the President concludes this portion of his message as follows:

When the convention concludes its labors, I will transmit to the Congress the constitution as framed by the convention for its consideration and for such action as it may deem advisable.

O